TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936

No. 534

BOURJOIS, INC., APPELLANTS,

vs.

CLYDE R. CHAPMAN, GEORGE W. LEADBETTER AND GEORGE H. COOMBS

APPEAL FROM THE DISTRICT OF THE UNITED STATES FOR THE DISTRICT OF MAINE

FILED NOVEMBER 18, 1936.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 534

BOURJOIS, INC., APPELLANT,

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MAINE

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[fol. 1]

IN UNITED STATES DISTRICT COURT, DISTRICT OF MAINE, SOUTHERN DIVISION

BOURJOIS, INC., Plaintiff,

vs.

CLYDE R. CHAPMAN, GEORGE W. LEADBETTER and GEORGE H. COOMBS, Defendants

STIPULATION AS TO RECORD—Filed September 30, 1936

It is Hereby Agreed and Stipulated by and between counsel that the record on appeal shall consist of the following:

1. The original bill of complaint verified December 6th, 1935 and filed on December 7th, 1935.
2. The answer to the original bill of complaint, filed on January 3rd, 1936.
3. The supplemental bill of complaint verified March 3rd, 1936 and filed April 3rd, 1936.
4. The supplemental answer to the supplemental bill of complaint, dated June 10th, 1936 and filed June 15th, 1936.
5. The interrogatories filed by the plaintiff unto the defendants, and the answers to said interrogatories.
6. The opinions of the court.
7. The findings of fact and conclusions of law.
8. The final order or decree herein.
9. The petition for appeal and the order allowing the [fol. 2] same.
10. The assignments of error.
11. The citation.

11½. The statement filed under U. S. S. C. Rule 12.

12. The testimony in narrative form pursuant to Equity Rule No. 75, Par. (b) as modified by the order of the Supreme Court of the United States of America, dated May 31st, 1932 as follows:

13. The depositions of Leonard E. Durfor and Morris S. Levine, shall be omitted.

14. The depositions of John Bartholomew and Bernard M. Douglas in condensed form, and the condensed narrative statements of said depositions, filed in this court, are

herewith approved of as conforming to said Equity Rule No. 75 (b).

15. The testimony of Louis E. Weiner, Merrill A. Hay, Frederick W. Rugg, Felix E. Guernier, Frank E. Deahna, Alfred P. Cook, taken on behalf of plaintiff, in condensed narrative form and the condensed narrative statement of said testimony, now on file in this court, are herewith approved of as conforming to said Equity Rule No. 75 (b).

16. The testimony of Elmer W. Campbell, taken on behalf of the defendants on June 24th, 1936, and the condensed narrative statement of said testimony, now on file in this court is herewith approved of as conforming to said Equity Rule No. 75 (b).

17. The testimony in full of certain expert witnesses, in question and answer form, namely, the deposition of Dr. [fol. 3] Samuel Peck, the testimony of Henry C. Fuller taken on July 27th, 1934, the testimony of Dr. J. Harper Blaisdell taken on July 27th, 1934, and the testimony of Elmer W. Campbell taken on July 27th, 1934; and the testimony of Dr. J. Harper Blaisdell taken on January 3rd, 1936.

18. The testimony of Elmer W. Campbell taken on behalf of plaintiff on January 3rd, 1936, in condensed narrative form, and the condensed narrative statement of such testimony, now on file in this court, is herewith approved of as conforming to said Equity Rule No. 75 (b).

Dated Sept. 30, 1936.

Verrill, Hale, Booth & Ives, Solicitors for Plaintiff.
Ralph W. Farris, Solicitor for Defendants.

[fol. 4] [File endorsement omitted.]

[fol. 5] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO RECORD—Filed October 30, 1936

It is hereby stipulated and agreed by way of amendment to the stipulation heretofore filed on September 30, 1936 that there be included in the record on appeal the motion of the plaintiff to amend its original bill of complaint and the motion of the defendants to amend their answer; and

that there be omitted from said record on appeal the list of names and addresses submitted by the defendants in answer to the twelfth interrogatory and the two opinions of the Court appearing in the statement filed in compliance with Rule 12 of the United States Supreme Court, which opinions are to appear elsewhere in the record.

Verrill, Hale, Booth & Ives, Attorneys for the Plaintiff. Ralph W. Farris, Attorney for the Defendants.

[fol. 6] [File endorsement omitted.]

[fol. 7] IN UNITED STATES DISTRICT COURT, DISTRICT OF MAINE

BOURJOIS, INC., Plaintiff,

vs.

CLYDE R. CHAPMAN, GEORGE W. LEADBETTER and GEORGE H. COOMBS, Defendants

BILL OF COMPLAINT—Filed December 7, 1935

To the Hon. Judge of the United States District Court of the District of Maine:

The plaintiff above mentioned, complaining of the above mentioned defendants and each of them, alleges and represents as follows:

1. Plaintiff now is and for at least five years plaintiff always has been, a corporation organized and existing under the laws of the State of New York, and having its office and principal place of business in the Borough of Manhattan, City and State of New York. Plaintiff now is, and for more than five years, plaintiff always has been, a citizen and resident of the State of New York. For more than thirty years, the plaintiff and its predecessors in business have been engaged in selling cosmetics and cosmetic prepa-
[fol. 8] rations throughout the United States of America, and more particularly to customers having their places of business located within the State of Maine. In particular, plaintiff's said cosmetics and cosmetic preparations, and

the cosmetics and cosmetic preparations of its predecessors, have always consisted almost wholly of perfumed cosmetics and cosmetic preparations.

Said business of plaintiff and of its predecessors in business has always been carried on in interstate commerce between the State of Maine and other states of the United States. Plaintiff's office and principal place of business, and the offices and principal places of business of plaintiff's predecessors, always have been located outside of the State of Maine. The business of plaintiff and of its predecessors has been conducted, and said business is now being conducted, with customers having places of business located within the State of Maine, by taking orders from said customers so located within the State of Maine, approving of these orders at the home office of the plaintiff or of its predecessors outside of the State of Maine, and then shipping the cosmetics and cosmetic preparations which which have been ordered by said customers, from plaintiff's place of business located outside of the State of Maine, to the place of business of said customer within the State of Maine. Said shipments have always been made in orig- [fol. 9] inal sealed packages or containers intended and adapted to be delivered directly to retail customers in sealed form. Said business has been conducted for more than ten years, wholly in interstate commerce between the State of Maine and other States of the United States. Plaintiff intends to carry on said business and each and every part thereof, in interstate commerce as above stated, on and after January 1st, 1936.

2. The defendant, Clyde R. Chapman, is the Attorney-General of the State of Maine. The defendant, George W. Leadbetter is the Commissioner of Health and Welfare of the State of Maine. The defendant George H. Coombs is the Director of Public Health of the State of Maine. Said defendants, and each of them are citizens and residents and inhabitants of the State of Maine. On and after January 1st, 1936, said defendants will have charge of enforcing the Law and the Regulations (if any) hereinafter referred to, and they intend enforcing said Law and said Regulations (if any) on and after January 1st, 1936.

3. This Hon. Court has jurisdiction over this action, because it is a suit of a civil nature in equity, where the matter

in controversy exceeds, exclusive of interest and costs, the sum or value of Three Thousand ($3,000.00) Dollars, and this suit arises under the Constitution of the United States of America, and under the Constitution of the State of Maine. Likewise this suit is between citizens of different states.

Heretofore, and during the year 1935, the People of the State of Maine enatced a law entitled "An Act for the [fol. 10] Regulation of Cosmetics." Said Law is Chapter 109 of the Public Laws of 1935 of the State of Maine. Said Law has not been repealed subsequent to the enactment thereof, and said Law will be in full force and effect on and after January 1st, 1936. Profert is made of a true copy of said Law, whenever required by this Hon. Court.

5. Plaintiff is informed and believes and therefore avers that the Department of Health and Welfare of the State of Maine has not officially issued any Regulations under said Law, subsequent to the enactment of said Law, and up to the date of filing of this complaint.

6. Prior to the passage of said Law, there had been no Law or Regulation of any kind of the State of Maine, regulating the sale or offering for sale or other dealings in cosmetics or cosmetic preparations, within the State of Maine, save Chapter 278 of the Public Laws of 1933, which has been repealed by said Chapter 109 of the Public Laws of 1935. The enforcement of said Law entitled "Chapter 278 of the Public Laws of 1933", was enjoined by this Hon. Court in an action filed in this Court by the plaintiff, and said former Statute, namely "Chapter 278 of the Public Laws of 1933", was never enforced.

7. Under Section 1 of said Chapter 109 of the Public Laws of 1935, said Law is limited to the conduct of a beauty shop, barber shop, hair dressing establishment or [fol. 11] similar establishment, and said Law does not apply to the holding for sale or sale or offering for sale of a cosmetic preparation, save in the conduct of a beauty shop, barber shop, hair dressing establishment or similar establishment, and said Law does not apply to the holding for sale, or sale, or offering for sale, in intrastate commerce within the State of Maine, of cosmetic preparations by drug stores, department stores, and other stores and establishments which are not beauty shops, barber shops, hair

dressing establishments or similar establishments. The defendants threaten and intend to apply said Law, by regulating the holding for sale, the sale, and the offering for sale, in intrastate commerce within the State of Maine of cosmetic preparations by drug stores, and department stores, and by other stores or establishments which do not come within the scope of said Section 1. Said intended action of the defendants, and each of them, is beyond the authority given to the Department of Health and Welfare under said Law, and said defendants intend to exceed the authority given to the Department of Health and Welfare under said Law.

8. Said Section 1 of said Law is in conflict with Section VIII of the Constitution of the United States of America and the Constitution of the State of Maine, in that said Section 1 prohibits the person or concern which shall conduct a beauty shop or a barber shop or a hair dressing establishment or a similar establishment within the State of Maine, on and after January 1st, 1936, from applying [fol. 12] plaintiff's cosmetic preparations in the conduct of said beauty shop, barber shop, hair dressing establishment or similar establishment, even if the customer desiring the application of said cosmetic preparation has purchased the same subsequent to January 1st, 1936 outside of the State of Maine in the original sealed package put out by plaintiff, or if said customer has purchased the same in the State of Maine directly from plaintiff or a dealer, in direct interstate commerce, and for the personal use of said customer, and even if said customer supplies said cosmetic preparation which has been so purchased, to be applied to said customer in the conduct of a beauty shop, barber shop, hair dressing establishment or similar establishment in the State of Maine, on or after January 1st, 1936, and even if said preparation is harmless to said customer.

9. Said Section 1 is also contrary to the Constitution of the United States of America, in that it attempts to regulate and prohibit the holding for sale, and the sale, and the offering for sale, and the supplying or application within the State of Maine of said cosmetic preparations which have been put out and which will be put out by the plaintiff in original sealed packages, and which will be sold and shipped in said interstate commerce in said original sealed

packages to the concerns enumerated in said Section 1 and located within the State of Maine on and after January 1st, 1936, although the sale and transportation of said cosmetic preparations will not be prohibited by any Federal Statute, on and after January 1st, 1936, and even though said cosmetic preparations are absolutely harmless. Said Section 1 is also contrary to the Constitution of the United [fol. 13] States of America in that it requires registration of plaintiff's cosmetic preparations sold in said original sealed packages, and in said interstate commerce, even though said preparations are absolutely harmless.

10. Section 2 of said Law is void and contrary to the Constitution of the United States of America, in that said Section 2 extends to plaintiff's cosmetic preparations sold and shipped in original sealed packages in interstate commerce between the State of Maine and other states, and because the State of Maine does not have the right to require the plaintiff to register its cosmetic preparations so sold and shipped in original sealed packages in interstate commerce, or to compel plaintiff to secure renewals of said certificates of registration.

11. Section 2 of the Law is void and contrary to the Constitution of the United States of America and contrary to the Constitution of the State of Maine, on the ground that said Section 2 gives unto said Department of Health and Welfare an unreasonable and unconstitutional delegation of power, in that said Department is authorized to regulate or to refuse the issuance of certificates, which in the judgment of the Department contain injurious substances in such amounts as to be poisonous, injurious or detrimental to the person, without a hearing at which the plaintiff will be entitled to take and present testimony and hear the testimony offered on behalf of said Department, and at which the plaintiff will be entitled to be represented by counsel for said purpose and in order to cross-[fol. 14] examine witnesses produced on behalf of the Department. Plaintiff alleges that under said Section 2, said Department can render an ex parte ruling denying a certificate of registration to a cosmetic preparation of plaintiff, even if said cosmetic preparation is in fact wholly harmless, and that the holding for sale, and sale, and offering for sale, and the supplying or application of such wholly

harmless cosmetic preparations by the persons enumerated in said Section 1 will be then forbidden within the State of Maine, unless and until the plaintiff prevails by means of the appeal which is attempted to be provided by said Section 2.

Section 2 is void and contrary to the Constitution of the United States of America and contrary to the Constitution of the State of Maine, because said Section 2 does not provide for any appeal of any kind in case the Department refuses to renew a Certificate of Registration after the original Certificate of Registration has been granted.

12. Section 2 of said Law is contrary to the Constitution of the State of Maine and of the United States of America because it gives to said Department the right to prohibit the sale of cosmetic preparations, within the State of Maine, which in the judgment of the Department contain injurious substances in such amount as to be poisonous, injurious or detrimental to the person, and this grant of authority unto the Department is so broad as to give said Department the right to prohibit the sale of plaintiff's said cosmetic preparations, even during the original period of one [fol. 15] year for which a Certificate of Registration may have been granted for any said cosmetic preparation. Likewise said Section 2 does not provide for an appeal from a ruling of the Department which shall prohibit the sale of plaintiff's cosmetic preparation, after an original certificate or a renewal certificate has been granted, permitting the sale of said cosmetic preparation. Likewise, said Section 2 gives said Department the authority to prohibit the sale of a cosmetic preparation wholly as the result of ex parte proceedings.

13. Section 2 is contrary to the Constitution of the State of Maine and of the United States of America in that said Section is unreasonable and arbitrary and that it grants to the Department an authority and power which is greatly in excess of the authority and power which is needed to protect the general public health. Plaintiff alleges that it has been well known for many years and by the consensus of medical opinion, that there are a great many cosmetic preparations which are absolutely and unquestionably harmless to the general public, but which may produce a minor skin rash in the case of individual users who com-

prise a very small proportion of the users of cosmetic preparations, and much less than one percent of said users. A certain and very small percentage of the consuming public, much less than one percent, comprise persons who are excessively sensitive to certain materials used in cosmetic [fol. 16] preparations, and which are generally absolutely harmless. Section 2 of the Statute is so broad as to give said Department authority to refuse the grant or renewal of certificates for plaintiff's cosmetic preparations, or to prohibit the sale thereof, if any such cosmetic preparation contains any substance which may be detrimental, even to a single user. This Statute is worded so broadly, and gives such extensive power to the Department, as to prohibit the sale in intrastate commerce within the State of Maine, by the persons enumerated in Section 1, of each and every cosmetic preparation, even though such cosmetic preparations have been extensively sold and used throughout the United States of America and more particularly within the State of Maine, for more than forty years, and even though such cosmetic preparations have been recognized by the consensus of medical opinion as to be pure and absolutely harmless, if such cosmetic preparation is detrimental to a single user.

14. Section 2 is contrary to the Constitution of the State of Maine and the Constitution of the United States of America, although it attempts to provide for an appeal from the refusal of said Department to issue a Certificate of Registration, because said Law does not provide for any proceedings before the Department at which testimony shall be taken and at which plaintiff shall have the right to be represented by counsel, and the Law does not provide for keeping a record of the proceedings before the Department and for transmitting said record to the Superior [fol. 17] Court in the County of Kennebec or any other county in the State from which said cosmetic preparation was offered for registration, so that the proceedings of the Department can be duly reviewed in said Superior Court, and because such section does not provide for any effective right of review or appeal.

15. Section 3 of said Statute is unfair, and arbitrary and discriminatory, and contrary to the Constitution of the United States of America and of the State of Maine because Section 3 includes creams and shampoo preparations, and

said Section 3 excludes household and toilet soaps, unless such household soaps and toilet soaps are represented by the manufacturer or the producer thereof as a preparation for the treatment of disease. Various shampoo preparations are identical in formula and in properties with various toilet soaps, and more particularly liquid toilet soaps. For many years certain toilet soaps have been sold throughout the United States of America and in the State of Maine, and such toilet soaps are of the superfatted or of the cold cream variety, and such toilet soaps contain a substantial percentage of cold cream. Said toilet soaps will be sold in the State of Maine subsequent to January 1st, 1936. The danger to the public health from the use of said toilet soaps, both liquid soaps and superfatted or cold cream soaps, is just as great as the danger to the public health which may result from the use of the creams which are mentioned in the first paragraph of said Section 3.

[fol. 18] 16. Section 5 of said Law is void and contrary to the Constitution of the State of Maine and of the United States of America, in that said Section gives sheriffs and the other officers and persons designated in said section, the right to seize the cosmetic preparations sold by the plaintiff in said interstate commerce in original sealed packages to the persons and concerns located within the State of Maine and enumerated in Section I, even though said preparations are absolutely pure and harmless in each and every respect.

17. Sections 6 and 7 of said Law are contrary to the Constitution of the United States of America and the Constitution of the State of Maine, in that said Sections 6 and 7 do not and will not give the plaintiff or the customers of the plaintiff enumerated in Section I, who have purchased the cosmetic preparations of the plaintiff in said interstate commerce, and in said original sealed packages, the opportunity to make any defense, in case the Department has refused a registration, or in case the Department has refused a renewal of a registration, or in case the Department has prohibited the sale of said cosmetic preparations subsequent to the grant of a registration or a renewal thereof, and during the term of said regisration or renewal, even though said cosmetic preparations are pure and harmless in each and every respect.

18. Said Law is contrary to the Constitution of the State of Maine and the Constitution of the United States of America in that it gives the Department the authority to [fol. 19] prohibit the sale and supplying or application of plaintiff's cosmetic preparations, either during the term of a registration or a renewal thereof, or upon the expiration of a registration or renewal thereof, without giving plaintiff's customers located within the State of Maine and who are enumerated in Section 1 thereof, the right to use and sell plaintiff's said cosmetic preparations which have been purchased in said original sealed packages and in said interstate commerce by said customers and which have been brought within the State of Maine, during the term of a registration or a renewal thereof, and relying upon the grant of a registration or a renewal thereof.

19. Said Law is contrary to the Constitution of the State of Maine and the Constitution of the United States of America, in that it fails to provide for giving either advance notice or adequate notice of any kind to plaintiff's customers enumerated in said Section 1 and located within the State of Maine, and who have plaintiff's cosmetic preparations in said original sealed packages which have been purchased in said interstate commerce, of the refusal of the Department to grant a renewal of a registration, or of the Department's decision to prohibit the sale of any said cosmetic preparations of plaintiff.

20. Said Law is contrary to the Constitution of the State of Maine and the Constitution of the United States of America, because it does not give plaintiff or its customers who are enumerated in said Section 1 and who are located [fol. 20] within the State of Maine the right to claim merchandise which has been seized pursuant to Sections 5-7 of said Law, or to resist payment of the fine imposed by Section 10 of said Law by showing that the action of the Department or other person enumerated in Section 5, is arbitrary or unreasonable or contrary to fact, and because said Law prevents a defense on the merits against the penalty provided by Section 10 of said Act.

21. Said Law is contrary to the Constitution of the United States of America, because it attempts to compel plaintiff to take out licenses in order to conduct its business

in interstate commerce with its customers who are located within the State of Maine, and who are enumerated in said Section 1.

22. Said Law is contrary to the Constitution of the State of Maine and the Constitution of the United States of America because it seeks to impose registration and renewal fees upon plaintiff, which has never done business in the State of Maine, and which does not intend to do business in the State of Maine, save in said interstate commerce. The State of Maine has no power to demand fees for the privilege of doing business within the State of Maine, save from persons located within, and engaged in intrastate commerce within the State of Maine, for the purpose of safeguarding the health of the public within the State of Maine.

23. Plaintiff has not complied with said Law and it has not applied for any certificate of registration under said [fol. 21] Law. Plaintiff intends to refuse to comply with said Law and it intends to refuse to apply for any certificate of registration thereunder, on and after January 1st, 1936. Said law is contrary to the Constitution of the State of Maine and the Constitution of the United States of America, because it does not give plaintiff's customers who are located within the State of Maine and who are enumerated in said Section 1, the right to make profert of specimens of plaintiff's cosmetic preparations for purposes of registration, and to pay the fees required for registration.

24. The business of manufacturing and selling and applying cosmetic preparations is an old and well established business in the United States of America, and said business has amounted to several hundred million dollars per annum, since at least 1925. The cosmetic preparations which have been sold and applied in the State of Maine and throughout the United States of America during the last twenty years, have been generally harmless, with certain exceptions, and the cosmetic preparations which plaintiff has put out and which plaintiff intends to put out, have been and will be absolutely harmless in each and every respect and have been made and will be made according to the highest standards with respect to formula and manufacture.

25. The effect of the enforcement of said Law will be to ruin plaintiff's interstate business with its customers who

are located within the State of Maine and who are enumer-
[fol. 22] ated in said Section 1. Said business has been carried on by plaintiff and its predecessors for more than thirty years, and the value thereof exceeds the sum of ten thousand dollars. The customers of plaintiff who are located within the State of Maine and who are enumerated in said Section 1 will be subjected to the searches and seizure provided by said Law, and the continuous and confiscatory fines which are provided by said Law. The fine of one hundred dollars provided by Section 10 of said Law is far in excess of the average retail sales price of plaintiff's cosmetics. The purpose and intent in providing for said searches and seizures, and for said fine up to one hundred dollars for each violation of said Law, was to intimidate plaintiff into registering under said Law, instead of contesting the validity thereof, and to intimidate the persons enumerated in Section 1 from dealing with plaintiff in said interstate commerce. Said fine is excessive and not proportioned to the offence.

26. Section 10 of said Law is contrary to the Constitution of the State of Maine and the Constitution of the United States of America in that it delegates to said Department the right to make ordinances and by-laws, and regulations, the violation of which is punished by a fine up to one hundred dollars. No provision is made in said Law for the publication and giving of due notice of said ordinances or by-laws or regulations, and said Law does not impose any standard for, or check upon, the passage of the ordinances [fol. 23] or by-laws which are provided in said Section 10.

27. Plaintiff relies generally upon the Constitution of the State of Maine and more particularly as follows:

Article I, Section 1, Section 5, Section 6, Section 9; Article III.

28. Plaintiff relies generally upon the Constitution of the United States of America and more particularly as follows:

Section VIII, subsections 1, 3, 18; Section X, subsection 2; Article IV; Article V; Article VI; Article VII; Article VIII;

29. If plaintiff's said interstate business with the concerns enumerated in Section 1 of said Law, is interrupted

even temporarily, this will cause great and irreparable injury to plaintiff, for which there is no adequate remedy at law. For more than thirty years, plaintiff and its predecessors have spent millions of dollars in advertising and promoting the sale of its cosmetic preparations throughout the United States of America, including the State of Maine. If plaintiff's business in the State of Maine is interrupted even temporarily, the residents of the State of Maine who have been purchasing and using plaintiff's cosmetic preparations will purchase and use competing cosmetic preparations, thus diminishing the value of plaintiff's good-will and business in the State of Maine, and the damages re-
[fol. 24] sulting therefrom cannot be computed with any certainty.

30. The grant of a temporary ex parte restraining order, and the grant of a preliminary injunction, restraining the enforcement of said Law, will not injure or endanger the health of any person in the State of Maine.

31. Answer under oath is waived.

Wherefore Plaintiff prays for a temporary ex parte restraining order, and for an injunction, both preliminary and permanent, enjoining the defendants and each of them, and all persons acting in concert with them or through and under them, from enforcing said Act, and for such other and further relief as may be deemed proper.

Bourjois, Inc., by Bernard M. Douglas, Treasurer.
Verrill, Hale, Booth & Ives, Solicitors for Plaintiff. Mock & Blum, of Counsel for Plaintiff.
(Seal.)

[fol. 25] *Duly sworn to by Bernard M. Douglas. Jurat omitted in printing.*

[fol. 26] [File endorsement omitted.]

[fol. 27] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO AMEND BILL OF COMPLAINT—Filed January 3, 1936

Now comes the plaintiff in the above entitled cause and moves to amend its bill of complaint herein by adding thereto a new paragraph to be numbered 22½ and to read as follows:

Said law is contrary to the Constitution of the State of Maine and the Constitution of the United States of America because it is confiscatory of the right of a dealer in Maine who sells plaintiff's cosmetic preparation from holding for sale, selling, offering for sale, giving away or dealing in within the State of Maine any cosmetic preparation of plaintiff's however harmless including original packages purchased and shipped in said interstate commerce because by Section 1 of said law such holding for sale, selling, offering for sale, giving away and dealing in within the State of Maine is prohibited, unless each said cosmetic preparation has been registered with and a certificate of registration secured from the Department of Health and Welfare and Section 2 of said law confers upon said Department of Health and Welfare no authority to issue and said Department of Health and Welfare has no authority to issue a certificate of registration to anyone other than a manufacturer, proprietor or producer of any cosmetic preparation, namely, the plaintiff herein. The effect of said law will be to destroy said plaintiff's said interstate business with dealers in the State of Maine by selling said original packages of cosmetic preparations to said dealers in the State of Maine, who have purchased and who will [fol. 28] purchase the same for purposes of resale within the State of Maine, because said dealers have refused and will refuse to purchase said original packages of plaintiff's unregistered cosmetic preparations, in said interstate commerce, for purposes of sale in the State of Maine to retail customers.

By its Attorneys Verrill Hale Booth & Ives.

[fol. 29] [File endorsement omitted.]

[fol. 30] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER—Filed January 3, 1936

To the Honorable Judge of the United States District Court of the District of Maine:

And now comes the above defendants and answer the bill of complaint of the plaintiff as follows:

1. The defendants admit the allegations contained in the first three sentences of Paragraph 1 of the plaintiff's bill. As to the fourth and following sentences of said Paragraph 1 of the plaintiff's bill, the defendants are without knowledge.

2. The defendants admit the allegations contained in Paragraph 2 of the plaintiff's bill.

3. The defendants admit the allegations contained in Paragraph 3 of the plaintiff's bill.

4. The defendants admit the allegations contained in Paragraph 4 of the plaintiff's bill.

5. The defendants admit the allegations contained in Paragraph 5 of the plaintiff's bill.

6. The defendants admit the allegations contained in Paragraph 6 of the plaintiff's bill.

7. The defendants deny the allegations contained in Paragraph 7 of the plaintiff's bill.

8. The defendants deny the allegations contained in Par-
[fol. 31] agraph 8 of the plaintiff's bill.

9. The defendants deny the allegations contained in Paragraph 9 of the plaintiff's bill.

10. The defendants deny the allegations contained in Paragraph 10 of the plaintiff's bill.

11. The defendants deny the allegations contained in Paragraph 11 of the plaintiff's bill.

12. The defendants deny the allegations contained in Paragraph 12 of the plaintiff's bill.

13. The defendants deny the allegations contained in Paragraph 13 of the plaintiff's bill.

14. The defendants deny the allegations contained in Paragraph 14 of the plaintiff's bill.

15. The defendants deny the allegations contained in Paragraph 15 of the plaintiff's bill.

16. The defendants deny the allegations contained in Paragraph 16 of the plaintiff's bill.

17. The defendants deny the allegations contained in Paragraph 17 of the plaintiff's bill.

18. The defendants deny the allegations contained in Paragraph 18 of the plaintiff's bill.

19. The defendants deny the allegations contained in Paragraph 19 of the plaintiff's bill.

20. The defendants deny the allegations contained in Paragraph 20 of the plaintiff's bill.

21. The defendants deny the allegations contained in Paragraph 21 of the plaintiff's bill.

22. The defendants deny the allegations contained in Paragraph 22 of the plaintiff's bill.

23. The defendants admit the allegations contained in the first sentence of Paragraph 23 of the plaintiff's bill.

As to the second sentence in said Paragraph 23, the defendants have no knowledge as to what the plaintiff intends to do.

[fol. 32] As to the third sentence in said Paragraph 23, the defendants deny all the allegations contained therein.

24. The defendants deny the allegations contained in Paragraph 24 of the plaintiff's bill.

25. The defendants deny the allegations contained in Paragraph 25 of the plaintiff's bill.

26. The defendants deny the allegations contained in Paragraph 26 of the plaintiff's bill.

27. The defendants neither admit nor deny the statements made in Paragraph 27 of the plaintiff's bill.

28. The defendants neither admit nor deny the statements made in Paragraph 28 of the plaintiff's bill.

29. The defendants deny the allegations contained in Paragraph 29 of the plaintiff's bill.

30. The defendants deny the allegations contained in Paragraph 30 of the plaintiff's bill.

31. The defendants admit the allegation contained in Paragraph 31 of the plaintiff's bill.

Wherefore the defendants pray that the plaintiff's bill may be dismissed and for their costs in this behalf wrongfully sustained.

Clyde R. Chapman, George W. Leadbetter, George H. Coombs, by Ralph W. Farris, Ass't Attorney General, Their Attorney.

[fol. 33] [File endorsement omitted.]

[fol. 34] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO AMEND ANSWER—Filed January 27, 1936

Now come the defendants in the above entitled cause and move to amend their answer herein by adding thereto a new paragraph in answer to Paragraph twenty-two and a half of the plaintiff's amended bill:

22½. The defendants deny the allegations contained in Paragraph twenty-two and a half of the plaintiff's amended bill.

The defendants further move to amend their answer herein by striking out Paragraph seven of their original answer and substituting in lieu thereof the following paragraph:

7. The defendants deny the allegations contained in the first sentence of Paragraph seven of the plaintiff's bill and say that said law applies to all persons, firms, corporations or co-partnerships who shall hold for sale, sell, or offer for sale, any cosmetic preparation in intra-state commerce un-

less the said preparation has been registered and is not confined to the conduct of beauty shops, barber shops, hairdressing establishments or similar establishments.

The defendants admit the allegations contained in the second sentence of Paragraph seven of the plaintiff's bill, in that they intend to apply the law to all persons, firms, [fol. 35] corporations or co-partnerships who sell or deal in cosmetic preparations in intra-state commerce in the State of Maine, but they deny that drug stores and department stores or other stores or establishments selling cosmetic preparations do not come within the scope of Section 1 of said law; and the defendants further deny that they intend to exceed the authority given to the Department of Health and Welfare under said law.

The defendants in the above entitled cause move to further amend their answer herein by striking out Paragraph fourteen of the original answer and substituting a new Paragraph fourteen which reads as follows:

14. The defendants deny that Section 2 is contrary to the Constitution of the State of Maine and the Constitution of the United States of America. They say that the law does provide for an appeal from the refusal of said department to issue a certificate of registration.

They admit that said law does not provide for any proceedings, but the department is authorized under the provisions of Section 2 of the act to make rules and regulations for proceedings before the department, and that inasmuch as the law provides for appeal to the Superior Court of any county in the State, and whereas the Superior Court is a court of record with established forms of procedure, it was unnecessary for the legislature to set up a form of procedure in the act complained of; and they say that the provisions for appeal to the Superior Court in Section 2 of said act are broad enough to protect the rights of all applicants for registration under the act.

The defendants in the above entitled cause move to further amend their answer herein by striking out Paragraph [fol. 36] twenty-four and substituting in place thereof a new paragraph to be numbered twenty-four, and to read as follows:

24. The defendants admit the allegations contained in the first sentence of Paragraph twenty-four. As to the allega-

tions contained in the second sentence of said Paragraph twenty-four, the defendants are without knowledge.

The defendants in the above entitled cause move to further amend their answer herein by striking out Paragraph twenty-six and inserting in place thereof a new paragraph to be numbered twenty-six and to read as follows:

26. The defendants deny that Section 10 of said law is contrary to the Constitution of the State of Maine and the Constitution of the United States of America, but admit that it delegates to said department the right to make ordinances, and by-laws, and regulations, the violation of which is punishable by a fine up to one hundred ($100.00) dollars, and that no provision is made in said law for the publication and giving of due notice of said ordinances or by-laws or regulations, that being left to the discretion of the department, and said law does not impose any standard for, or check-up on, the passage of the ordinances or by-laws which are provided in said Section 10, but say that Section 2 provides that the department is authorized to make regulations as may be necessary in carrying out the purpose of this act to safeguard public health, and say that it is unnecessary for the Legislature to provide for publication and notice of said ordinances, by-laws, or regulations.

The defendants in the above entitled cause move to further amend their answer herein by striking out Paragraph [fol. 37] thirty of said original answer and adding thereto a new paragraph to be numbered thirty, and to read as follows:

30. The defendants admit that the grant of a temporary ex parte restraining order, and the grant of a preliminary injunction, restraining the enforcement of said law, may not injure or endanger the health of many persons in the State of Maine, yet the defendants say that the refusal to grant a restraining order or injunction and dismissal of the bill of complaint may protect the health of many people in the State of Maine, and they say that the law and state regulations to be promulgated thereunder are intended to protect the public health, and safety, and the common welfare of the people of the State of Maine by preventing the sale within the state of harmful, injurious or poisonous cosmetic preparations; and they say that the plaintiff is not entitled to an injunction restraining the enforcement of

Chapter 109 of the Public Laws of Maine of 1935, and that the said statute is not in conflict with any provision of either the Federal Constitution or the Constitution of Maine, or any amendments thereto.

Clyde R. Chapman, George W. Leadbetter, George H. Coombs, by Clyde R. Chapman, Attorney General, Attorney for Defendants.

Amendment allowed. John A. Peters, U. S. D. J.

1 Feb., 1936.

[fol. 38] [File endorsement omitted.]

[fol. 39] IN UNITED STATES DISTRICT COURT

[Title omitted]

SUPPLEMENTAL BILL OF COMPLAINT—Filed April 3, 1936

To the Hon. Judge of the United States District Court of the District of Maine:

The plaintiff above mentioned, complaining of the above menitoned defendants and each of them, alleges and represents as follows:

1. An original bill of complaint has been filed in this cause, and an answer has been filed by defendants.

2. Subsequent to January 1st, 1936 the plaintiff has continuously conducted the business specified in paragraph 1 of the original bill of complaint.

3. Subsequent to the filing of the original bill of complaint, as well as prior thereto, the plaintiff has always carried on the business specified in paragraph 1 of the original bill of complaint, by shipping its cosmetics and cosmetic preparations in the original sealed packages specified in paragraph 1 of the original bill of complaint, and said original sealed packages have always been shipped in interstate [fol. 40] commerce between New York and Maine, by means of shipping containers, in each of which containers a plurality of said original sealed packages have been packed. The customers of plaintiff in said interstate business between

New York and Maine have always been retailers having places of business in Maine. Said retailers have received said shipping containers from plaintiff in said interstate commerce, and said retailers have opened said containers, removed said original sealed packages therefrom, and they have offered for sale and sold said original sealed packages to the ultimate consumers and the said business of said retailers has been carried on wholly within the State of Maine, in which state said retailers have delivered said packages and received the purchase price thereof. The cosmetic preparations which have been sold and shipped by the plaintiff in interstate commerce between the several states of the United States of America, and more particularly in interstate commerce between the State of New York and the State of Maine, have always included and now include the cosmetic preparations specified in paragraph 3 of Chapter 109 of the Public Laws of 1935 of the State of Maine. Subsequent to the filing of the original bill of complaint, plaintiff has not registered any of its cosmetic preparations in Maine, and it does not intend to register any of its cosmetic preparations in Maine. Subsequent to January 1st, 1936, plaintiff has always intended to and it now intends to continue its said interstate business in the manner aforesaid with its said customers in Maine, and said customers have desired to continue said business with plaintiff, and said customers have desired to resell said original sealed packages within the State of Maine, as aforesaid, after said packages have been removed from said shipping containers by said customers. Said original sealed packages always have included, and they now are, bottles and jars [fol. 41] and other containers which always have been purchased and will be purchased by ultimate consumers in Maine and elsewhere at retail, for the personal use of said ultimate consumers.

4. Subsequent to January 1st, 1936, the defendants and the Department of Health and Welfare of the State of Maine have intended to enforce said Chapter 109 of the Public Laws of 1935 against said retailer customers of the State of Maine who have purchased or who will purchase said unregistered cosmetic preparations of plaintiff subsequent to January 1st, 1936, if said retailer customers have or will have their places of business located in Maine, and if said retailer customers have secured or will secure

said unregistered preparations from plaintiff in interstate commerce as aforesaid, in said original sealed packages and containers, subsequent to January 1st, 1936, and if said retailer customers have resold or will resell said original sealed packages to ultimate consumers within the State of Maine, in the manner aforesaid.

5. Plaintiff is informed and believes and therefore avers that subsequent to the filing of the original bill of complaint herein, the defendants, or persons acting under the defendants, have notified persons, firms, corporations or co-partnerships who are or which have been engaged in or will be engaged in selling and delivering plaintiff's said unregistered cosmetic preparations at retail to ultimate consumers wholly within the State of Maine in said original sealed packages so removed from said large shipping containers, directly purchased from plaintiff in said interstate commerce and delivered directly to the places of business of said persons, firms, corporations, or co-partnerships in said original sealed packages, put up in said large shipping containers, that the sale and delivery at retail of [fol. 42] plaintiff's said unregistered cosmetic preparations to ultimate consumers wholly within the State of Maine, in said original sealed packages removed from said shipping containers, is and will be unlawful in the State of Maine subsequent to January 1st, 1936, if said cosmetic preparations have been so purchased and shipped and delivered subsequent to January 1st, 1936, by reason of the fact that plaintiff has not registered its cosmetic preparations in Maine.

6. Plaintiff alleges that subsequent to the filing of the original bill of complaint, and subsequent to January 1st, 1936, various persons and corporations and firms who have been engaged and who wish to engage in selling plaintiff's said unregistered cosmetic preparations in said original sealed packages at retail to ultimate consumers wholly within the State of Maine, have refused to purchase plaintiff's said unregistered cosmetic preparations from the plaintiff in said interstate commerce, shipped and packed as aforesaid, even though plaintiff has always offered and it now offers and it intends to offer said cosmetic preparations for sale in said original sealed packages, packed and shipped in said interstate commerce in the large shipping

containers previously mentioned, and said retailer customers of plaintiff have so refused, because plaintiff has not registered its said cosmetic preparations under Chapter 109 of the Public Laws of Maine.

7. Plaintiff alleges that subsequent to the filing of the original bill of complaint, and subsequent to January 1st, 1936, it was the intention and policy of the defendants, and of the Department of Health and Welfare of the State of Maine, to refuse to issue the certificates of registration which are specified in Section 2 of said Chapter 109 of the Public Laws of 1935, for plaintiff's said cosmetic prepara- [fol. 43] tions, unless the plaintiff itself applied for said certificates of registration, and unless the plaintiff itself or some person acting on behalf of plaintiff paid the registration fee and the renewal fee specified in said Section 2, for each certificate of registration.

8. Plaintiff alleges that the manufacture of its said cosmetic preparations involves numerous and valuable trade secrets and secret formulas of which plaintiff is the sole owner, and that the persons, firms, corporations or copartnerships which have sold or which may be selling or which will sell plaintiff's said cosmetic preparations at retail in the State of Maine, do not know of such trade secrets or trade formulas and that they cannot supply unto said Department of Health and Welfare the information which is necessary to enable said Department of Health and Welfare to decide whether or not certificates of registration should be issued pursuant to said Section 2, for plaintiff's said cosmetic preparations. Plaintiff also alleges that certificates of registration cannot be granted under said Section 2, save on applications filed by the plaintiff.

9. Plaintiff alleges that by reason of the refusal of plaintiff's retailer customers to purchase plaintiff's said unregistered cosmetic preparations subsequent to January 1st, 1936, in said interstate commerce, and packed and shipped as aforesaid, for purposes of direct resale and delivery by said retailer customers wholly within the State of Maine, in said original packages taken from said shipping containers, to ultimate consumers, great and irreparable injury has been caused to the plaintiff and to its business and good-will in the State of Maine. Plaintiff also alleges that retailers who have places of business in Maine

will continue to refuse to purchase plaintiff's said unregis-
t-red cosmetic preparations from plaintiff in said inter-
[fol. 44] state commerce and in said original sealed pack-
ages, packed in large shipping containers as aforesaid, for purposes of resale in said original sealed packages wholly within the State of Maine, to ultimate consumers, thus causing continuing and irreparable injury unto the plaintiff and to its business and good-will in the State of Maine.

Plaintiff has no adequate remedy at law for the great and irreparable injury specified herein.

10. Plaintiff alleges that in order to continue its said business with retailer customers who have sold plaintiff's said unregistered cosmetic preparations wholly within the State of Maine in said original sealed packages taken from said shipping containers and directly secured in said shipping containers from plaintiff in interstate commerce, it is necessary for the plaintiff to have a prompt decision as to whether or not plaintiff is compelled to register its said cosmetic preparations in the State of Maine and to pay the fees required by said Section 2, in order to enable said retailer customers of plaintiff to have the right to buy said unregistered cosmetic preparations from plaintiff in the manner aforesaid, and to sell said original sealed packages to the ultimate consumers in Maine.

11. Plaintiff alleges that if it is compelled to continue its business in said unregistered cosmetic preparations with retailer customers having their places of business located in Maine, by shipping to said customers its said unregistered preparations in said original sealed packages, and without the use of said shipping containers, the extra expense and inconvenience which will be caused by the elimination of the use of such shipping containers will destroy its business with said retailer customers having their places [fol. 45] of business located in Maine, and that said retailer customers will refuse to purchase plaintiff's said unregistered preparations, for purposes of resale wholly within the State of Maine.

12. Plaintiff alleges that for more than thirty years, it has been the universal practice in the cosmetic industry in the United States of America, to ship cosmetic preparations to retailers in individual containers as aforesaid and for retailers to remove said original sealed packages from

said shipping containers, and to resell the original sealed packages at retail to ultimate consumers.

13. Plaintiff alleges that the defendants and the Department of Health and Welfare, subsequent to January 1st, 1936 have not intended to apply the fees received under said Chapter 109 of the Public Laws of 1935, from concerns which are not engaged in intrastate commerce in the State of Maine, solely for the purpose of carrying out the purpose of said Act, in so far as said Act relates to cosmetic preparations which are not manufactured in Maine.

14. Plaintiff alleges that subsequent to January 1st, 1936 the defendants, and the Department of Health and Welfare, have not installed any system whereby it can be determined whether the fees received under said Act from concerns who are not engaged in intrastate commerce within the State of Maine, are or will be used by said Department for carrying out the purposes of said Act, in so far as said Act relates to cosmetic preparations which are not manufactured in Maine.

15. Plaintiff alleges that subsequent to January 1st, 1936 the Department of Health and Welfare has used, in order to carry out the purposes of said Act, employees or officers who perform other duties which relate wholly to intrastate commerce in Maine and which do not relate to the [fol. 46] purposes of said Act, without allocating the time of said employees between their duties under this Act and said other duties.

16. Plaintiff alleges that it has not engaged in intrastate commerce in Maine either prior to or subsequent to January 1st, 1936, and that the State of Maine has no right or authority to impose any conditions or fees upon plaintiff, as a condition upon the right of retailers to sell plaintiff's products at retail within the State of Maine.

Answer under oath is waived.

Wherefore plaintiff prays that an order be granted for the filing of this supplemental bill of complaint, that the defendants be ordered to file a supplemental answer thereof, and plaintiff also prays for a temporary ex parte restraining order, and for an injunction, both preliminary and permanent, enjoining the defendants and each of them and all persons acting in concert with them or through and

under them, from enforcing said Chapter 109 of the Public Laws of 1935 against retailer customers of plaintiff in Maine who do business with plaintiff in the manner aforesaid, and plaintiff also prays for such other and further relief as may be deemed proper.

Bourjois, Inc., B. M. Douglas, Vice-President. Verrill, Hale, Booth & Ives, Solicitors for Plaintiff. Mock & Blum, of Counsel for Plaintiff. (Seal.)

[fol. 47] *Duly sworn to by B. M. Douglas. Jurat omitted in printing.*

[fol. 48] [File endorsement omitted.]

[fol 49] In United States District Court

[Title omitted]

Supplemental Answer—Filed June 15, 1936

To the Hon. Judge of the United States District Court of the District of Maine:

Now come the defendants in answer to Supplemental Bill of the plaintiff and say:

1. They admit the allegations contained in Paragraph 1 of Supplemental Bill.

2. They admit the allegations contained in Paragraph 2 of said bill.

3. Defendants have no knowledge of the facts alleged in Paragraph 3 of said bill, and they deny all material allegations contained therein.

4. Defendants admit the allegations contained in Paragraph 4 of said bill except that they do not intend to enforce the provisions of said act while cosmetic preparations are in interstate commerce, but do intend to enforce the provisions of said act when unregistered cosmetic preparations are offered for sale in Maine by retail dealers to the citizens of Maine.

[fol. 50] 5. Defendants admit the allegations contained in Paragraph 5 of said bill, except the last two lines

thereof, and they deny that the plaintiff must register its cosmetic preparations.

6. Defendants have no knowledge of the facts alleged in Paragraph 6 of said bill, therefore, deny the same.

7. Defendants deny the allegations contained in Paragraph 7 of said bill and say that they are not concerned as to who applies for registration under said act, but they shall insist that all cosmetic preparations are registered under the provisions of said act before offered for sale in this state by retail dealers therein.

8. Defendants deny the allegations contained in Paragraph 8 of said bill, and say that it is not necessary for the retail dealers in Maine to know the trade secrets or secret formulas of which plaintiff alleges that it is the sole owner, because the Bureau of Health and Welfare does not require any such information from applicants for registration, and certificate of registration can be issued to the retail dealers selling plaintiff's goods in Maine upon application filed by any retail dealer under the provisions of said act.

9. Defendants deny the allegations contained in Paragraph 9 of said bill and say that the plaintiff would not suffer any injury providing the cosmetic preparations are registered in accordance with the provisions of said act.

10. Defendants deny the allegations contained in Paragraph 10 of said bill, and say that decision on this matter has already been rendered by this Court on the original bill.

[fol. 51] 11. Defendants deny the allegations contained in Paragraph 11 of said bill.

12. Defendants admit the allegations contained in Paragraph 12 of said bill.

13. In answer to Paragraph 13 of said bill, defendants say that they do not intend to interfere in any way with the plaintiff in conducting its interstate commerce business, but will enforce the provisions of the act only when unregistered cosmetic preparations are offered for sale in intrastate commerce in the State of Maine.

14. Defendants deny the allegations contained in Paragraph 14 of said bill.

15. In answer to Paragraph 15 of said bill, defendants say that employees of the department are not especially assigned to carry out the purposes of said act and that they perform other duties under the direction of the department of Health and Welfare, but that their time is allocated when they are performing duties under the provisions of this act.

16. In answer to Paragraph 16 of the plaintiff's bill, defendants say they have no knowledge as to the allegation that the plaintiff is not engaged in interstate commerce in Maine, and they do not contend that the State of Maine has any authority under the Act to impose any conditions or fees upon plaintiff while they are engaged in interstate commerce, and they are only attempting to enforce the provisions of said act when unregistered cosmetic preparations are offered for sale in intrastate commerce by retail dealers in Maine.

[fol. 52] Wherefore the defendants pray that the plaintiff's Supplemental Bill may be dismissed and for their costs in this behalf wrongfully sustained.

Dated at Augusta this 10th day of June, 1936.

Clyde R. Chapman, George W. Leadbetter, George H. Coombs, by Ralph W. Farris, Assistant Attorney General, Their Attorney.

[fol. 53] [File endorsement omitted.]

[fol. 54] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION FOR LEAVE TO FILE INTERROGATORIES—Filed April 15, 1936

Now comes the plaintiff in the above entitled cause and moves that it be given leave to file the within interrogatories in writing for the discovery by the defendants of evidence material to the plaintiff's cause.

By its Attorneys Verrill, Hale, Booth & Ives.

Motion granted. John A. Peters, United States District Judge.

15 Apr., 1936.

[fol. 55] IN UNITED STATES DISTRICT COURT

[Title omitted]

INTERROGATORIES—Filed April 15, 1936

Now Comes the plaintiff above mentioned and it herewith propounds the following interrogatories unto the defendants, pursuant to Equity Rule 58:

1. If the plaintiff does not register the cosmetic preparations put out by plaintiff and defined by Section 3 of Chapter 109 of the Public Laws of 1935, and the plaintiff sells its said unregistered cosmetic preparations to a retail concern which has its place of business located in Maine, by accepting the order of said retail concern in the home office of plaintiff in New York, and by shipping said cosmetic preparations in interstate commerce from plaintiff's place of business in New York to the place of business of said retail concern in Maine, is it the intention of the defendants or of the Department of Health and Welfare to enforce said Chapter 109 of the Public Laws of 1935 against plain-
[fol. 56] tiff's preparations and against said retail concern if said retail concern resells and delivers said unregistered cosmetic preparations to the plaintiff at retail wholly within the State of Maine to the ultimate consumers within the State of Maine and said retail concern receives the purchase price for said cosmetic preparations from said consumers within the State of Maine?

2. If interrogatory No. 1 cannot be answered by "Yes" or "No", please state in full and minute detail the circumstances or conditions under which the defendants intend or do not intend to apply or enforce said Chapter 109 of the Public Laws of 1935, under the circumstances specified in said interrogatory No. 1.

3. Was it the intention of the defendants and of the Department of Health and Welfare, at any time during the period prior to January 1st, 1936 and subsequent to the date on which said Chapter 109 of the Public Laws of 1935 was enacted, to enforce the same against any said retail concern, under the circumstances stated in interrogatory No. 1, if said retail concern purchased said unregistered cosmetic preparations of the plaintiff subsequent to January 1st, 1936, and said concern resold and delivered the same to

ultimate consumers in Maine, subsequent to January 1, 1936?

[fol. 57] 4. If interrogatory No. 3 cannot be answered by "Yes" or "No", please state in full and minute detail the circumstances or conditions according to which the defendants and said Department intended or did not intend to enforce said Chapter 109 of the Public Laws of 1935 under the circumstances specified in interrogatory No. 3.

5. Please state in full and minute detail, the conditions or circumstances, if any, under which the defendants and said Department do not intend to interfere with the sale of plaintiff's said unregistered cosmetic preparations by a retailer located in Maine, and who sells and delivers said preparations to ultimate consumers within the State of Maine, if said unregistered cosmetic preparations have been purchased outside of the State of Maine and they have been brought within the State of Maine by said retailer subsequent to January 1st, 1936.

6. Please state in full and minute detail the conditions or circumstances, if any, under which the defendants and said Department do not intend to enforce said Chapter 109 of the Public Laws of 1935, with respect to the sale of plaintiff's said unregistered cosmetic preparations by a retailer located in Maine and who sells and delivers said preparations to retail customers within the State of Maine, if said [fol. 58] unregistered cosmetic preparations have been purchased outside of the State of Maine and they have been brought within the State of Maine by said retailer subsequent to January 1st, 1936.

7. Referring to the period between the date of enactment of said Chapter 109 of the Public Laws of 1935 and January 1st, 1936, state in full detail the conditions or circumstances, if any, under which the defendants did not intend to enforce said Chapter 109 of the Public Laws of 1935 against retail druggists or other retailers having their places of business located within the State of Maine, and who purchased plaintiff's said unregistered cosmetic preparations outside of the State of Maine after January 1st, 1936 and who resold and delivered said unregistered cosmetic preparations to ultimate consumers within the State of Maine, subsequent to January 1st, 1936.

8. If the plaintiff directly sells and directly ships its said unregistered cosmetic preparations in interstate commerce between New York and Maine to a retail concern which has its place of business located in Maine, the shipment of said unregistered cosmetic preparations being made in inter-[fol. 59] state commerce from New York directly to the place of business of said concern in Maine, by means of large shipping containers in each of which there are packed a plurality of individual sealed containers or bottles or packages, said individual sealed containers or bottles or packages being the customary containers or bottles or packages in which said cosmetic preparations have been and are sold to the ultimate consumer, and the retail concern which receives said large shipping containers in Maine opens said large shipping containers, and said retail concern then sells and delivers said individual sealed containers or bottles or packages directly to ultimate consumers within the State of Maine, please state fully the intention of the defendants and of said Department, relative to the enforcement of said Chapter 109 of the Public laws of 1935, with respect to said sale and delivery of said individual sealed containers or bottles or packages within the State of Maine.

9. Is it not a fact, that prior to January 1st, 1936 and subsequent to the date of enactment of Chapter 109 of the Public Laws of 1935, it was the intention of the defendants and of said Department to enforce said Chapter 109 of the Public Laws of 1935 so as to prevent the sale of plaintiff's unregistered cosmetic preparations to ultimate consumers by retailers within the State of Maine subsequent to Jan-[fol. 60] uary 1st, 1936, if the individual sealed containers or bottles or packages which are referred to in interrogatory No. 8 were purchased and brought within the State of Maine by retailers after January 1st, 1936, even if said individual sealed containers or bottles or packages were sold by plaintiff to said retailers in interstate commerce between New York and Maine, and said individual sealed containers or bottles or packages were shipped directly by plaintiff from New York to the places of business of said retailers in Maine, if said individual sealed containers or bottles or packages were packed in large shipping containers as specified in interrogatory No. 8?

10. Please state fully each and every notice which has been issued by the defendants or by said Department or

by any person authorized by the defendants or any of them unto retail druggists and other retail concerns who have places of business located within the State of Maine and who are engaged in the business of selling those cosmetic preparations which are defined by Chapter 109 of the Public Laws of 1935 to ultimate consumers within the State of Maine, relative to the enforcement of said Chapter 109 of the Public Laws of 1935.

11. If any of the notices referred to in the last interrogatory were written or printed, please affix copies of the same unto the answers to these interrogatories, so that the plaintiff can make copies thereof.

[fol. 61] 12. Have the defendants, or any of them, or has any person authorized by the defendants or any of them, or has said Department, issued any notice unto retail druggists or other concerns engaged in selling and delivering cosmetic preparations to ultimate consumers within the State of Maine, relative to the enforcement of said Chapter 109 of the Public Laws of 1935 against the sale of plaintiff's unregistered cosmetic preparations within the State of Maine.

13. If the last interrogatory is answered in the affirmative, please state each and every said notice, the date of each and every said notice, the name of each and every person who issued the same, and the name and address of each and every person to whom any said notice was issued. If any said notice was in writing, please affix the original thereof unto the answers to these interrogatories, so that the plaintiff can make a copy of the same.

14. Is it not a fact that subsequent to the enactment of said Chapter 109 of the Public Laws of 1935, it has been the intention of the defendants or of said Department to require payment by the plaintiff of the registration fees which are specified in Section 2 of said Chapter 109 of the Public Laws of 1935, if applications were filed to secure said registrations, even if plaintiff did not engage in intrastate commerce in Maine?

[fol. 62] 15. In the event that plaintiff refuses to register its cosmetic preparations pursuant to Section 2 of Chapter 109 of the Public Laws of 1935, and a retailer or other per-

son who has a place of business within the State of Maine purchases and brings into the State of Maine, subsequent to January 1st, 1936, a stock of plaintiff's said unregistered cosmetic preparations, for the purpose of selling and delivering the same within the State of Maine, is it the intention of the defendants to issue unto any such retailer or other person the certificates of registration for plaintiff's said cosmetic preparations which are required by Section 2 of said Chapter 109 of the Public Laws of 1935, if said retailer or other person pays the registration fees required by Section 2 and applies for said registration?

16. If the plaintiff refuses to pay the fees required by Section 2 of Chapter 109 of the Public Laws of 1935, please state in full and minute detail, the circumstances or conditions, if any, under which the defendants do not intend to enforce said Chapter 109 of the Public Laws of 1935, against the sale and delivery wholly within the State of Maine, of plaintiff's unregistered cosmetic preparations.

[fol. 63] 17. Prior to January 1st, 1936 and subsequent to the enactment of Chapter 109 of the Public Laws of 1935, was it ever the intention of the defendants, under any circumstances or conditions, not to enforce Chapter 109 of the Public Laws of 1935, against the sale and delivery within the State of Maine, of plaintiff's cosmetic preparations which were purchased and brought within the State of Maine subsequent to January 1st, 1936, if plaintiff did not register the same pursuant to Section 2 of said Chapter 109 of the Public Laws of 1935? If so please state in minute detail the circumstances or conditions under which the defendants did not intend to enforce said Chapter 109 of the Public Laws of 1935 against said sale and delivery of plaintiff's said unregistered cosmetic preparations in the State of Maine.

18. Is it not a fact that the defendants, or one of them, or a person acting under the authority of the defendants or one of them or said Department, have notified retailers who are selling and delivering cosmetic preparations within the State of Maine that it is unlawful for said retailers to sell and deliver plaintiff's unregistered cosmetic preparations to ultimate consumers within the State of Maine, if said preparations of plaintiff have been purchased by said re-

[fol. 64] tailers and brought within the State of Maine subsequent to January 1st, 1936?

19. If the last interrogatory is answered in the affirmative, please state each and every such notice, also state the date thereof, state the name of the person who issued or gave each said notice, and state the name and address of each and every person to whom said notice was given.

20. If, subsequent to January 1st, 1936, any person, firm, corporation or copartnership shall hold for sale, sell, offer for sale wholly within the State of Maine, give away, deal in within the State of Maine, any unregistered cosmetic preparation put out by plaintiff, the same having been purchased and brought within the State of Maine subsequent to January 1st, 1936, please state in full and minute detail the circumstances or conditions, if any, under which the defendants or said Department do not intend to enforce the provisions of Sections 5, 6, 7, and 10 of Chapter 109 of the Public Laws of 1935.

21. Has the Department of Health and Welfare of the State of Maine made any regulations pursuant to Section 2 of the Public Laws of 1935?

22. If the last interrogatory is answered in the affirmative, please annex a copy of each such regulation unto the answers to these interrogatories so that the plaintiff can copy the same.

[fol. 65] 23. Has the Department of Health and Welfare of the State of Maine passed any by-laws as provided in Section 10 of Chapter 109 of the Public Laws of 1935?

24. If the last interrogatory is answered in the affirmative, please annex unto the answers to these interrogatories a copy of each said by-law so that plaintiff can make a copy of the same.

25. Has the Department of Health and Welfare made any rulings relative to the enforcement of Chapter 109 of the Public Laws of 1935?

26. If the last interrogatory is answered in the affirmative, please annex a copy of each and every said ruling unto the answers to these interrogatories so that the plaintiff can make a copy of the same.

27. Please state in full and minute detail what system, if any, has been put in force by the Department of Health and Welfare subsequent to January 1st, 1936 relative to the use of the fees which will be collected by said Department under Section 2 of Chapter 109 of the Public Laws of 1935, to the extent which will be necessary to enable plaintiff to determine how the Department intends to use the fees which are collected from persons who are not engaged in intrastate commerce in Maine.

Verrill, Hale, Booth & Ives, Solicitors for Plaintiff.

NOTE.—Answer under oath is required to each interrogatory by each of the defendants.

[fols. 66-67] [File endorsement omitted.]

[fol. 68] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWERS TO INTERROGATORIES—Filed May 13, 1936

Now come the defendants above mentioned and herewith submit the following answers to the interrogatories filed by the plaintiff:

1. In answer to interrogatory Number 1, the defendants say that it is not the intention of the department of Health, nor the defendants to in any way interfere with interstate commerce, and feel that the law applies to all retail dealers in cosmetic preparations doing an intrastate business. The answer must be, Yes.

2. The answer to interrogatory Number 2, is covered in the answer to interrogatory Number 1.

3. Yes, it was the intention of the department of Health, under the circumstances specified, to enforce the requirements of Chapter 109 of the Public Laws of 1935, after January 1, 1936, when the cosmetic preparations were placed on sale by any person, firm or corporation in the State of Maine, but with no intention of interfering with interstate commerce.

[fol. 69] 4. The department of Health did not intend to interfere with cosmetic preparations shipped in bulk in the original packages to the retailer in the State of Maine, but when the cosmetic preparations were offered for sale by any dealer or proprietor in Maine, then intended to enforce the provisions of said act.

5. It is the intention of the department of Health to enforce the requirements of said Chapter 109 only after cosmetic preparations are sold by dealers in intrastate commerce, but with no intention of interfering with interstate commerce.

6. Interrogatory Number 6 seems to be taken care of by the answer to interrogatory Number 5.

7. It was the intention of the department of Health, prior to January 1, 1936, to enforce the requirements of Chapter 109 of the Public Laws of 1935, in all cases where the preparations were taken out of interstate commerce and placed on sale in the State of Maine with relation to circumstances specified in interrogatory Number 7, but it was not the intention of the said department to interfere in any way with interstate commerce.

8. If the plaintiff directly sells, or directly ships its unregistered cosmetics from New York to retail dealers in Maine the department of Health does not intend to enforce the act against the plaintiff. When the preparations are placed on sale by the retail dealers in Maine to be sold to the individual in Maine, the said department intends to enforce the provisions of the act.

9. Prior to January 1, 1936, it was the intention of the department of Health to enforce Chapter 109 of the Public Laws of 1935, where it applied to intrastate commerce, but it was not the intention of said department at any time to interfere with interstate commerce.

[fol. 70] 10. A notice was inserted in all daily papers of the State of Maine and published on April 27, 28 and 29, 1936.

11. A copy of said notice is hereto affixed.

12. In answer to interrogatory Number 12, the defendants say that verbal notices have been given to a large

number of operators of hairdressing establishments to use or sell only registered preparations if purchased after January 1, 1936, and a list of those having received said notices is hereto attached.

13. The answer to interrogatory Number 13, will be found in the answer to interrogatory Number 12, and the lists are hereto attached.

14. Yes.

15. Yes.

16. The defendants do not intend to enforce Chapter 109 of the Public Laws of 1935 against the sale and delivery wholly within the State of Maine of plaintiff's unregistered cosmetic preparations until such preparations come into intrastate commerce and are placed on the shelves and counters of retail dealers in Maine to be sold to the citizens of Maine, and they have no intention of interfering with unregistered cosmetic preparations which do not come within the requirements of said Chapter 109.

17. It was the intention of the department to enforce the requirements of said Chapter 109 only after unregistered preparations were placed into intrastate commerce and for sale by retailers in the State of Maine.

18. Yes. This is further covered by the answer to interrogatory Number 10.

19. Yes, covered by list prepared in answer to interrogatory Number 12.

[fol. 71] 20. It is the intention of the department of Health to enforce the provisions of Sections 5, 6, 7 and 10 of Chapter 109 of the Public Laws of 1935, against any unregistered cosmetic preparations which may be purchased and brought into the State subsequent to January 1, 1936, when such unregistered cosmetic preparations are offered by retail dealers in the State of Maine after said preparations have been taken out of interstate commerce and placed on the counters or shelves for sale to the citizens of Maine; but they have no intention of interfering with unregistered cosmetic preparations which are in interstate commerce.

21. No.

22. Covered by answer to interrogatory Number 21.

23. No.

24. Covered by answer to interrogatory Number 23.

25. A policy has been adopted which may possibly be considered a ruling under this section.

26. Copies of said rulings are hereto attached.

27. A separate account has been set up in the State Treasurer's department to which all cosmetic fees are credited, and which are to be expended by the department entirely for the enforcement of Chapter 109 of the Public Laws of 1935.

Dated at Augusta, this 12th day of May, A. D. 1936.

Clyde R. Chapman, George W. Leadbetter, George H. Coombs, Defendants.

Duly sworn to by Clyde R. Chapman et al. Jurat omitted in printing.

[fol. 72] Printed Notice re Cosmetic law: List of names and address- of those who received said notice, omitted here, under Stipulation filed October 30, 1936.

[fol. 73] Copy

July 15, 1935.

Decision of the Attorney General

Under the Cosmetic Law, Chapter 109, Public Laws of 1935, a preparation which differs from another preparation in color, or odor, or represented by the manufacturer to be different by trade name, requires separate registration.

Opinion rendered by Judge S. L. Fogg, Assistant Attorney General.

Approved by Clyde R. Chapman, Attorney General.

[fol. 74] Copy

October 8, 1935.

Dr. Elmer W. Campbell, Director Sanitary Engineering, Department of Health, Augusta, Maine.

Re Cosmetic Law, P. L. 1935, c. 109

DEAR SIR:

You ask orally relative to the registration of a preparation which differs from another in color or odor, or is represented by the manufacturer to be different by a trade name, and as to whether or not separate registration is required in such cases.

I am pleased to inform you that separate registration should be required for each of said preparations. The statute evidently was enacted to prohibit the sale of cosmetic preparations which contain substances injurious or detrimental to the person using same. In case a manufacturer manufactures a preparation which is submitted to you for registration, and after such submission changes the color or odor, in order for you to ascertain the ingredients in the color or odor you would have to make another examination in order to ascertain whether the matter producing the color or odor was injurious or otherwise.

If a manufacturer has preparations which are represented under separate trade names, it seems to me that you would have to examine each separate preparation in order to ascertain whether or not it was free from any injurious substance which would be detrimental.

Very truly yours, (Signed) Sanford L. Fogg, Deputy Attorney General.

SLF H

[fol. 75] Copy

April 7, 1936.

Elmer W. Campbell, D. P. H., Director, Division of Sanitary Engineering, State House, Augusta, Maine.

DEAR SIR:

Answering your inquiry of February 28th in reference to shaving soaps, please be advised that in our opinion all shaving soaps and shaving creams are subject to registra-

tion under the requirements of Chapter 109, Public Laws of 1935; and further, that shaving soaps and shaving creams are not household or toilet soaps within the meaning of Section 3 of the said Chapter 109.

Very truly yours, (Signed) Clyde R. Chapman, Attorney General.

[fol. 76] [File endorsement omitted.]

[fol. 77] IN UNITED STATES DISTRICT COURT

In Equity

BOURJOIS, INC., Plaintiff,

v.

CLYDE R. CHAPMAN, GEORGE W. LEADBETTER, GEORGE H. COOMBS, Defendants

OPINION—February 19, 1936

Per CURIAM:

This is a bill in equity seeking to enjoin the defendants from enforcing Chap. 109 of the Public Laws of 1935, entitled "An Act for the Registration of Cosmetics," which was heard before a statutory court of three judges under Sec. 380, Title 28, United States Code.

The hearing was on the plaintiff's motion for a temporary injunction on the ground that Sec. 1 of Chap. 109 of the Public Laws of 1935 was limited in its application to the conduct of beauty shops, barber shops, hair dressing establishments or similar establishments, but that the defendants threatened and intended to apply said law by regulating the holding for sale, the sale and the offering for sale in intrastate commerce within the State of Maine the cosmetic preparations by drug stores and department stores and by other stores or establishments which do not come within the scope of Sec. 1 of the Act, and such threat and intended action of the defendants is beyond the authority given to them under the Act.

That Sec. 1 of said Act is in conflict with Sec. VIII of the Constitution of the United States and of the Constitu-

tion of the State of Maine in that said section 1 prohibits any person or concern which was conducting a beauty shop, barber shop, hair dressing establishment or any similar establishment within the State of Maine on or after January 1, 1936, from applying the plaintiff's cosmetic preparations in the conduct of said beauty shop, barber shop, hair dressing establishment or other similar establishment, [fol. 78] even if a customer desiring the application of such cosmetic preparations has purchased the same subsequent to January 1, 1936, outside the State of Maine in the original sealed package put out by the plaintiff.

That said statute is contrary to the Constitution of the United States of America in that it attempts to regulate and prohibit the holding for sale, the sale and the offering for sale and the supplying or application within the State of Maine of cosmetic preparations which will be sold and shipped in interstate commerce in the original sealed packages to any of the concerns enumerated in Sec. 1 of the Act within said State.

That said statute is contrary to the Constitution of the United States and of the State of Maine in that it contains an unreasonable delegation of power and deprives the plaintiff of property without due process, inasmuch as it does not provide a hearing at which testimony may be taken, or require, in the event of an appeal from the ruling of the Department of Health and Welfare in case it refuses to issue or renew a certificate of registration, that a record of the proceedings before the Board shall be transmitted to the court so that it may be reviewed by the court; and that the statute does not provide for an effective right of review or appeal.

The provisions of the statute relating to hearings on appeal do not on their face deprive the plaintiff of due process of law, nor are penalties imposed for violation of the statute unreasonable or excessive.

We think the plaintiff has misinterpreted Section 1 of the Act in restricting it to the conduct of beauty shops, barber shops, hair dressing establishments or other similar establishments. The first part of the Act provides that no person, firm, corporation or co-partnership shall hold for sale, sell, offer for sale in intrastate commerce, give away or deal in within this state * * * any cosmetic preparation, unless the said preparation has been registered with

and a certificate of registration is secured from the Department of Health and Welfare.

[fol. 79] This, we think, is the proper construction of this section and expresses the intention of the Legislature in enacting this section, though a slightly different method of punctuation might have made it clearer.

The plaintiff stresses the interference with interstate commerce. The defendants in their brief insist it is not proposed by the state officials to interfere with interstate commerce; that they will only apply the law when cosmetics have entered into intrastate commerce.

Up to the time of the hearing no rules or regulations had been established by the Department of Health and Welfare, or any plan of putting the statute into operation. We think it is too early to anticipate that the state officials will undertake to interfere with interstate commerce when they insist that they have no such intention, and Sec. 1 of the Act merely prohibits holding for sale, the sale or offering for sale of cosmetic preparations in intrastate commerce.

The only section under which it can be urged that a burden is imposed on interstate commerce is Sec. 2, under which the Department of Health and Welfare is ordered to issue a certificate of registration to any manufacturer, proprietor or producer of cosmetic preparations on the payment of an initial registration fee of fifty cents per preparation, and to renew the same annually on the payment of the same fee.

The exercise of the police powers of the state to protect the inhabitants from injurious substances detrimental to their health is well recognized; Patapsco Guano Co. v. North Carolina, 171 U. S. 345, 354; Plumley v. Massachusetts, 155 U. S. 461; Savage v. Jones, 225 U. S. 501, 525, 527; McLean v. Denver & Rio Grande R. R. Co., 203 U. S. 38, 55; Tengera & Co. v. New York, 224 N. Y. 269.

Without further evidence of a purpose to interfere with interstate commerce, we think this court is not warranted in issuing a temporary injunction to prohibit action which may never take place so far as the plaintiff is concerned.

Much of the bill of the plaintiff relates to anticipated [fol. 80] action on the part of the Department of Health and Welfare of the state, which may never take place, and the above grounds of objection as the basis for the issuing

of a temporary injunction, we think, are not sufficient to warrant the issuing of a temporary injunction at this time.

The fees received under the provisions of this Act are to be used by said Department for carrying out the purposes of the Act, which clearly are for investigation and examination of cosmetic preparations to determine whether they are injurious to the health.

The motion for a temporary injunction is denied, but if it later appears that interstate commerce is unduly interfered with or due process is denied to the plaintiff by any of the provisions of the Act, or regulations adopted thereunder, as enforced by the state officials, the plaintiff's motion for a temporary injunction may be renewed pending final hearing on the bill and answer, when additional evidence may be submitted as to any action of the state officials in enforcing the statute.

[fol. 81] IN UNITED STATES DISTRICT COURT

BOURJOIS, INC.,

v.

CLYDE R. CHAPMAN et als.

OPINION

Per CURIAM:

The plaintiff, a citizen of the State of New York, brought its bill in equity to enjoin the Attorney General of Maine, and head of the Department of Health and Welfare of the State, and an employe of that department, defendants, the necessary jurisdictional facts being alleged, from enforcing Chapter 109 of the Public Laws of the State of Maine, which provides as follows:

"Sec. 1. Registration of cosmetics. On and after January 1, 1936, no person, firm, corporation or copartnership shall hold for sale, sell, offer for sale, in intra-state commerce, give away, deal in, within this state, supply or apply in the conduct of a beauty shop, barber shop, hairdressing establishment or similar establishment, any cosmetic preparation unless the said preparation has been registered with

and a certificate of registration secured from the department of health and welfare.

"Sec. 2. Department of health and welfare authorized to issue certificate of registration. The said department is hereby authorized to issue and shall issue a certificate of registration to the manufacturer, proprietor, or producer of any cosmetic preparation on the payment of an initial registration fee of 50¢ per preparation, which certificate shall be renewed annually on or before the first day of January in each succeeding year on the payment of a fee of 50¢.

"The said department is authorized to regulate or to refuse the issuance of certificates of registration or to prohibit the sale of cosmetic preparations which in its judgment contain injurious substances in such amounts as to be poisonous, injurious or detrimental to the person. Temporary certificates of registration may be issued by said department for any preparation pending investigation of the same.

"The department is hereby authorized to make such regu- [fol. 82] lations as may be necessary for carrying out the purpose of this act to safeguard the public health.

"Fees received under the provisions of this act shall be used by said department for carrying out the purpose of this act.

"From the refusal of said department to issue a certificate of registration for any cosmetic preparation appeal shall lie to the superior court in the county of Kennebec or any other county in the state from which the same was offered for registration."

Sec. 3 defines what is meant by "cosmetic preparations." The remainder of the Act relates to its enforcement.

A hearing was had on a motion of the plaintiff for a temporary injunction on the third day of January, 1936, at which this court construed Sec. 1 of the Act and held that the plaintiff's bill was prematurely brought, since the state officials had taken no steps to enforce the Act, which went into effect on January 1, 1936, and denied any intent to interfere with interstate commerce.

Since that time the state officials have notified local dealers in cosmetics of the Act and their intent to enforce it, and while a large number of out of the state manufacturers of cosmetic preparations have complied with the provisions

of Sec. 2, the plaintiff has refused to comply, and the state officials have made seizure in several stores where unregistered cosmetic preparations manufactured by the plaintiff, or by other out of the state manufacturers were being offered for sale.

The plaintiff now brings its supplemental bill to enjoin the state officials from enforcing the Act so far as the cosmetic preparations manufactured by the plaintiff are concerned, which was answered by the defendant denying any interference with interstate commerce or intent so to do in the future, and contending that the provisions of the Act are a proper exercise of the police powers of the state.

A hearing was held on June 24, 1936, at which time answers to interrogatories by the defendants and additional testimony of witnesses were introduced and briefs have been filed. It was stipulated in open court by the parties that the hearing should be considered a final hearing on the [fol. 83] original and supplemental bills and answers thereto and evidence, and that the case should be disposed of by a final decree at this time. It was also agreed that all the evidence introduced at the previous hearing and all pleadings previously filed may be considered by the court in so far as the same are pertinent to the issues presented.

The main points stressed by the plaintiff were that the bill violates Sec. 8 of Art. I, and also the Fourteenth Amendment of the federal Constitution, in that it imposes a burden on interstate commerce and deprives the plaintiff of property rights without due process.

The requirement that no person, firm, corporation or copartnership shall hold for sale, sell, offer for sale, supply or apply in the conduct of a beauty shop, barber shop, hairdressing establishment or similar establishment within the State of Maine, any cosmetic preparation unless the same shall be registered and a certificate of registration secured from the department of health and welfare, is expressly limited by the Act to intrastate commerce.

The plaintiff, however, contends that the requirement that every out of the state manufacturer or producer of cosmetic preparations who sells cosmetic preparations to retailers for sale in the State of Maine, shall register each preparation and pay an initial registration fee of 50¢ per preparation, is a burden on interstate commerce; that the plaintiff ships its products into the State in "original packages;"

hence the requirement that each "preparation" shall be registered and a fee of 50¢ per preparation paid is a burden on interstate commerce; and that each separate package of cosmetics remains in interstate commerce until sold by the retailer.

Packages seized in local stores were introduced in evidence as exhibits, containing lip sticks, face powder, toilet creams, and other cosmetic preparations, all in separate and small packages, some of which were approximately 1½" x ¾" x ½" in size, and which it was testified were shipped by the manufacturer from out of the state to the retailer in Maine in a shipping container or carton, from which they [fol. 84] are removed by the retailer and placed on the shelves and counters of the local trade for sale, or are kept in their storerooms until needed in their retail department; the only exception being where some individual may have ordered a cosmetic preparation not carried by the retailer and a single package containing the article is shipped direct to the consumer, or to the retailer and delivered in the original container to the purchaser.

It is clear, we think, that the "original package" is the shipping container in which the cosmetic preparations are shipped into the state, and when they are removed therefrom and placed on the shelves or counters, or in the storerooms of the retailer they have become mingled with the mass of property in the state and are no longer in interstate commerce, and if unregistered in accordance with Sec. 2 of the Act, are subject to seizure and forfeiture.

This is amply borne out by the decisions. The law relating to original packages was first considered in Brown v. Maryland, 12 Wheat. 419, in which the State of Maryland required all importers of intoxicating liquors by wholesale hogshead, barrel or tierce to take out a license which the Supreme Court held was repugnant to that provision of the Constitution forbidding a levying of a duty on imports as well as that declaring that Congress should have the power to regulate commerce with foreign nations.

The following dictum in the opinion in that case by Chief Justice Marshall: "We suppose the principle laid down in this case to apply equally to importations from a sister state," was subsequently considered in Woodruff v. Parham, 8 Wall. 123, and the decision was held to have no application to commerce between the states and only applied

to articles imported from a foreign country into the United States.

The principle laid down in Woodruff v. Parham was applied in Brown v. Huston, 114 U. S. 622, and in Pittsburgh & Southern Coal Co. v. Bates, 156 U. S. 577.

But in May v. New Orleans, 178 U. S. 496, which involved [fol. 85] the validity of tax assessments on goods imported from a foreign country, the goods were shipped in large cases for importation, but were put up in smaller packages, a large number being enclosed in each box. On arrival the packages were taken out and sold unbroken. The Court said:

"In our judgment the original package * * * was the box or case in which the goods imported were shipped, and when the box was opened for sale or delivery of the separate parcels contained in it, each parcel lost its distinctive character as an import and became property subject to taxation by the state as other like property situated within its limits."

The principles laid down in Austin v. Tennessee, 179 U. S. 343, are decisive of the case here. The Court said, page 359:

"The whole theory of the exemption of the original package from the operation of state laws is based upon the idea that the property is imported in the ordinary form in which, from time to time immemorial, foreign goods have been brought into the country. These have gone at once into the hands of the wholesale dealers, who have been in the habit of breaking the packages and distributing their contents among the several retail dealers throughout the State. It was with reference to this method of doing business that the doctrine of the exemption of the original package grew up. But taking the words 'original package' in their literal sense, a number of so-called original package manufactories have been started through the country, whose business it is to manufacture goods for the express purpose of sending their products into other States in minute packages, that may at once go into the hands of the retail dealers and consumers, and thus bid defiance to the laws of the State against their importation and sale. In all the cases which have heretofore arisen in this court the packages were of such size as to exclude the idea that they were to go directly

into the hands of the consumer, or be used to evade the police regulations of the State with regard to the particular article."

Again, the Court said on page 360 of the above case:

"This court has repeatedly held that, so far from lending its authority to frauds upon the sanitary laws of the several States, we are bound to respect such laws and to aid in their enforcement, so far as can be done without infringing upon the constitutional rights of the parties. The consequences of our adoption of defendant's contention would be far-reaching and disasterous. For the purpose of [fol. 86] aiding a manufacturer in evading the laws of a sister State, we should be compelled to recognize anything as an original package of beer from a hogshead to a vial; anything as a package of cigarettes from an importer's case to a single paper box of ten, or even a single cigarette, if imported separately and loosely; anything from a bale of merchandise to a single ribbon, provided only the dealer sees fit to purchase his stock outside the State and import it in minute quantities."

While the court's conclusion in this case was grounded on the opportunity for fraud upon the health laws of a state, the opportunity is just as great in connection with cosmetic preparations, if the contention of the plaintiff is sustained in this case.

The principles laid down in Austin v. Tennessee were adhered to in Cook v. Marshall County, 196 U. S. 261, 269, 270, and cited with approval in Kirmeyer v. State of Kansas, 236 U. S. 568, 573; McDermott v. State of Wisconsin, 228 U. S. 116, 135; Hebe Co. v. Shaw, 248 U. S. 297, 304.

In Cleveland Macaroni Co. v. State Board of Health, 256 Fed. 376, in which the plaintiff's contention was the same as that of the plaintiff here, viz: that the goods put up in separate packages were shipped in large shipping cases and taken out by the retailer and sold in the original packages in which they were put up, or the retailer removed them from the cases in which they were shipped and placed them on the shelves for sale to the consumer, the Court said:

"Ordinarily such disposition withdraws goods shipped into a state from the domain of interstate commerce, and

makes them a part of the general body of local commerce, and subjects them to any reasonable regulations by the State," citing Austin v. Tennessee, supra. The Court further said:

"It appears from the defendant's return on the order to show cause that the plaintiff's goods were shipped into the state in large containers or boxes, each containing a certain number of small packages or paper cartons, in quantities suitable for sale to the consumer, and that it is in this latter form they are sold by retailers."

In McDermott v. State of Wisconsin, supra, the Court said:

[fol. 87] "And where it has been found necessary to decide the boundary of Federal authority it has been generally held that, where goods prepared and packed for shipment in interstate commerce are transported in such commerce and delivered to the consignee and the package by him separated into its component parts, the power of Federal regulation has ceased and that of the State may be asserted," citing the cases of Austin v. Tennessee, and Cook v. Marshall County, supra.

Some of the state cases in which the doctrine of the above cases have been applied are: Commonwealth v. Schollenberger, 156 Penn. St. 201; Haley v. Nebraska, 42 Nebr. 556; McGregor v. Cone, 104 Iowa, 465, 471, 473; State v. Winters, 44 Kan. Sup. 723.

In Commonwealth v. Schollenberger, supra, the Court, in defining an original package, said:

It is "such form and size of package as is used by producers or shippers for the purpose of securing both convenience in handling and security in transportation of merchandise between dealers in the ordinary course of actual commerce."

The exhibits introduced in evidence cannot be said to comply with this definition. Also see United States v. One Hundred and Thirty-two Packages, 76 Fed. 364, 368; Vol. 2, Bouvier's Law Dictionary under Title, "Original Packages."

Under the rule laid down in the above cases we think interstate commerce ends under the facts shown by the evidence in this case, as soon as the separate packages in which the cosmetic preparations of the plaintiff were put up for sale to the consumer have been taken from the shipping container in which they were shipped into Maine, and placed on the shelves or counters, or in the storerooms of the retailers, and they are then subject to state laws.

The other principal issue in the case is whether Chap. 109 of the Public Laws of 1935 by its requirement of registration by the manufacturer of all cosmetic preparations sold or offered for sale in this state is a violation of the Fourteenth Amendment to the Federal Constitution, or a valid exercise of the police powers of the State for the purpose of safeguarding the public health of its citizens.

A manufacturer is not obliged to ship goods into the State for sale here, but if such goods are shipped into Maine for the purpose of resale by local dealers, they must be registered or they are subject to forfeiture.

It is urged, however, that it is a mere registration law [fol. 88] and is not within the police powers of the State, but imposes an undue burden on interstate commerce. Distinctions have been drawn between laws merely requiring the registration of products manufactured in one state and sold in a sister state, but which require no inspection, or where a sample of the article shipped into the State is required to be furnished by the shipper. Savage v. Jones, 225 U. S. 501; George H. Lee & Co. v. Webster, 190 Fed. 353. These cases, however, do not apply in toto to the statute under consideration. While the Act could have been drawn so that the intent of the legislature was more clearly defined, we think it obviously implies something more than mere registration of all cosmetic preparations by the manufacturer or producer, if intended for sale in this State by a retailer or jobber.

The intent of the legislature that something more than mere registration of cosmetic preparations is required is clearly indicated in Sec. 2 of the Act, whereby the Department of Health and Welfare "is authorized to refuse a certificate of registration, or to prohibit the sale of cosmetic preparations *which in its judgment* contain injurious substances in such amounts as to be poisonous, injurious or detrimental to the person;" and "Temporary certificates of

registration may be issued by said department for any preparation *pending investigation of the same.*"

There can be no question that the purpose of the Act was to safeguard the public health, since the Health Department under Sec. 2 "is authorized to make such regulations as may be necessary for carrying out *the purpose of this Act to safeguard the public health.*"

That there must be proceedings by the Department of Health to determine whether any cosmetic preparations may be detrimental to the health of the users is self-evident. The manufacturer is not required to furnish samples of its preparations with a formula containing its ingredients; the Department of Health and Welfare perforce must go to places where cosmetic preparations are on sale in this State and purchase packages and analyze their contents to determine whether they contain any substance or substances in such amounts as to be injurious to the health [fol. 89] of the person using such preparations. Evidence introduced before the court disclosed that certain cosmetic preparations have proven injurious to the users of the same.

It is well settled that in the exercise of its police powers a state may take such action, either by requiring proper labels, or by inspection, or by such proceedings as may be necessary to determine whether articles of food, fertilizers, any article advertised as of medicinal value, or any article to be applied to the face or body of the user for beautifying or medicinal purposes are injurious to the public health, even if incidentally interstate commerce may be affected. Savage v. Jones, supra, p. 525; Plumley v. Massachusetts, 155 U. S. 461; McDermott v. State of Wisconsin, supra, p. 131; Patapsco Guano Co. v. North Carolina Board of Agriculture, 171 U. S. 345; Standard Stock Food Co. v. Wright, 225 U. S. 540, 549; Powell v. Pennsylvania, 127 U. S. 678, 683.

In Austin v. Tennessee, supra, p. 349, the Court laid down the rule that:

"We have had repeated occasion to hold, where state legislation has been attacked as violative either of the power of Congress over interstate commerce, or of the Fourteenth Amendment to the Constitution, that, if the action of the state legislature were a bona fide exercise of its police power, and dictated by a genuine regard for the preserva-

tion of the public health or safety, such legislation would be respected, though it might interfere indirectly with interstate commerce."

And again on page 362:

"The doctrine that the silence of Congress as to what property may be of right carried from one State to another means that every article of commerce may be carried into one State from another and there sold, ought not to be extended so as to embrace articles which may not unreasonably be deemed injurious in their use to the health of the people. If this be not so, it follows that the reserved power of the State to protect the health of its people, by reasonable regulation, has application only in respect of articles manufactured within its own limits, and that an open door exists for the introduction into the State, against its will, of all kinds of property which may be fairly regarded as injurious in their use to health. If Congress have power to declare what property may and what may not be brought into one State from another State, then the action of a State by which certain articles, not unreasonably deemed injurious to health, were excluded from its markets, should stand until Congress legislated upon the subject. If Congress possesses no such power, it is because the framers of the Constitution never intended that the mere grant of power to regulate commerce should override the power reserved by the States to pass laws that had substantial relations to the health of their people."

[fol. 90] In the case of Powell v. Pennsylvania, supra, the court said, p. 683:

"It is scarcely necessary to say that if this statute is a legitimate exercise of the police power of the state for the protection of the health of the people, and for the prevention of fraud, it is not inconsistent with that amendment (14th); for it is the settled doctrine of this court that, as government is organized for the purpose, among others, of preserving the public health and the public morals, it cannot divest itself of the power to provide for those objects; and that the Fourteenth Amendment was not designed to interfere with the exercise of that power by the States. Mugler v. Kansas, 123 U. S. 663; Barbier v. Connolly, 113 U. S. 27."

It is urged that the fees collected of the registrants are not exclusively used for the inspection of cosmetic preparations and for carrying out the purpose of the Act; but the evidence fails to sustain any allegations of the plaintiff's bill and supplemental bills to this effect. This court cannot assume such to be the fact, and so far as any evidence appears in the case it is to the contrary. The legislature in its wisdom has fixed this fee as necessary to cover the cost of inspection and enforcing the act. Without evidence clearly showing it to be excessive, this court cannot declare this provision of the statute to be in violation of either the State or the Federal constitution.

Every presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a reasonable doubt. Sinking Fund Cases, 99 U. S. 700, 718.

The bills are dismissed with one bill of costs.

[fol. 91] IN UNITED STATES DISTRICT COURT

[Title omitted]

Findings of Fact and Conclusions of Law—Filed September 29, 1936

This cause having come on to be heard on June 24th, 1936, this Court herewith concurrently makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Plaintiff now is and for more than five years plaintiff always has been, a corporation organized and existing under the laws of the State of New York and having its office and principal place of business in the State of New York.

2. The defendants are all citizens of the State of Maine. Said defendants have the duty of enforcing Chapter 109 of the Public Laws of the State of Maine, approved April 1st, 1935.

3. Said Chapter 109 of the Public Laws of the State of Maine went into effect on January 1st, 1936.

4. Plaintiff moved for an interlocutory injunction before this Court and a hearing was had on said motion and it was

pressed to determination on January 3, 1936, before this Court, at which time this Court concurrently held that plaintiff's motion was prematurely brought, with leave to renew.

5. Subsequent to January 3, 1936, the defendants above mentioned have notified local dealers in cosmetics who are [fol. 92] engaged in selling cosmetics in intrastate commerce in the State of Maine, of the Act above mentioned and of the intent of the defendants to enforce said Act.

6. Plaintiff has never registered its cosmetic preparations pursuant to said Chapter 109 of the Public Laws of the State of Maine.

7. Subsequent to January 1st, 1936, the defendants have made seizures of unregistered cosmetic preparations manufactured by various manufacturers of cosmetic preparations having their places of business outside of the State of Maine and who were not citizens of the State of Maine, and who had not registered their preparations in compliance with said Chapter 109 of the Public Laws of the State of Maine.

8. The matter in controversy exceeds the sum of three thousand ($3,000.00) dollars, exclusive of interest and costs.

9. Subsequent to January 1st, 1936, the defendants have enforced and have intended to enforce said Chapter 109 of the Public Laws of the State of Maine by seizing cosmetic preparations put out by the plaintiff, and not registered in the State of Maine pursuant to said Chapter 109 and offered for sale in intrastate commerce within the State of Maine by dealers located within the State of Maine.

10. Subsequent to January 1st, 1936, the defendants have enforced and have intended to enforce said Chapter 109 of the Public Laws of the State of Maine, by arresting said dealers located within the State of Maine and engaged in intrastate commerce within the State of Maine, and who have sold in said intrastate commerce the cosmetic preparations of the plaintiff, which have not been registered pursuant to said Chapter 109.

11. For at least ten years the plaintiff has continuously conducted its business with wholesalers and retailers engaged in selling cosmetic preparations and who have had their places of business located within the State of Maine

and who have been engaged in selling said cosmetic preparations in intrastate commerce in the State of Maine, by taking orders from such wholesalers and retailers located in [fol. 93] the State of Maine, which orders were transmitted to the home office of the plaintiff in the State of New York for approval, and said orders, if so approved, were always filled by shipping said cosmetic preparations from the factory and warehouse of the plaintiff in the State of New York to said wholesalers and retailers within the State of Maine in interstate commerce.

12. The office and factory and warehouse of the plaintiff have never been located within the State of Maine and for at least ten years said office and factory and warehouse have been located within the State of New York.

13. Plaintiff has secured some of its said orders for its cosmetic preparations from said wholesalers and retailers who were located within the State of Maine by means of travelling salesmen, and some of said orders were received by mail in plaintiff's office in New York.

14. Said cosmetic preparations have always been shipped by the plaintiff to wholesalers and retailers located within the State of Maine, in packages or bottles, a plurality of which packages or bottles were placed within a shipping carton or container, and said bottles or packages were intended to be sold individually to the ultimate consumer and were sold individually to the ultimate consumer, and this has been the practice of the trade for more than twenty years.

15. The wholesalers and retailers who have purchased said cosmetic preparations from the plaintiff, and who have received said cosmetic preparations within the State of Maine, packed and shipped as above stated, have always opened said shipping containers, removed the individual boxes or packages therefrom, and said individual boxes or packages have been placed in the wholesaler's or retailer's storerooms or on his or its counters or shelves, and eventually have been sold in the regular course of business to his or its intrastate customers and ultimate consumers in the State of Maine by delivering said bottles or packages within the State of Maine, and accepting the purchase price for the same within the State of Maine.

[fol. 94] 16. Since the plaintiff has refused to register its cosmetic preparations under said Chapter 109, many wholesalers and retailers who have their places of business located within the State of Maine and who are engaged in selling cosmetic preparations in intrastate commerce within the State of Maine, have refused to order plaintiff's unregistered cosmetic preparations for sale in intrastate commerce within the State of Maine.

17. Unless it registers its cosmetic preparations, the enforcement of said Chapter 109 will put to an end a business which the plaintiff and its predecessors have conducted with wholesalers and retailers in the State of Maine for at least forty years.

18. The Department of Health & Welfare of the State of Maine had not adopted any regulations or ordinances or by-laws under said Chapter 109 up to and including June 24th, 1936.

19. Prior to the time of the hearing on the plaintiff's bill on June 24th, 1936, no attempt had been made by said Department of Health & Welfare to determine what portion of the time of these investigators or inspectors employed by said Department of Health & Welfare was spent in securing cosmetics for the purposes of analyses, in order to enforce said Chapter 109, and what portion of the time of these employees was devoted to other purposes.

20. Up to June 24, 1936, said Department of Health & Welfare had not designated any employee or employees for the sole purpose of visiting retail stores in the State of Maine, inspecting their stocks of cosmetic preparations, and picking up samples thereof for analysis, in order to enforce said Chapter 109.

21. Said Department of Health & Welfare notified plaintiff that it must register under said Chapter 109 if it wished to have its cosmetic preparations sold within the State of Maine.

22. No evidence was offered by the defendants to show what part of the fees collected under Chapter 109 has been expended prior to June 24, 1936, in enforcing said Chapter [fol. 95] 109 relative to cosmetic preparations made within the State of Maine, as distinguished from the cosmetic prep-

arations made outside of the State of Maine by plaintiff and other out-of-state manufacturers of cosmetic preparations.

23. Since the manufacturer is not required to furnish samples of its preparations with a formula containing its ingredients, the Department of Health & Welfare perforce must go to places where cosmetic preparations are on sale in this State and purchase packages and analyze their contents to determine whether they contain any substance or substances in such amounts as to be injurious to the health of the person using such preparations. Evidence introduced before the Court disclosed that certain cosmetic preparations have proven injurious to the users of the same.

24. No evidence has been submitted on behalf of plaintiff clearly showing that the fees fixed by said Chapter 109 are excessive.

[fol. 96] CONCLUSIONS OF LAW

1. This Court has jurisdiction of this action and of plaintiff's motion for an interlocutory injunction under U. S. Code, Title 15, Section 380, because there is diversity of citizenship between the plaintiff and each of the defendants, since plaintiff is a citizen of the State of New York and defendants are all citizens of the State of Maine, and the fact that the statutory amount is in issue has been conceded in the pleadings, and plaintiff has offered sufficient proof to establish the existence of such statutory amount, and this is a civil suit arising under the Constitution of the United States.

2. The original packages in which plaintiff has shipped its cosmetic preparations to the State of Maine, have been and are the shipping containers in which the cosmetic preparations have been shipped into the State, and when the cosmetic preparations, put up in individual bottles or packages, are removed from said shipping containers and placed on its shelves or counters or in the storerooms of the retailer to be sold directly to the ultimate consumer, said cosmetic preparations were and are no longer in interstate commerce, and if unregistered in accordance with Section 2 of said Chapter 109, said cosmetic preparations were and are subject to seizure and forfeiture, as provided in said Chapter 109.

3. Under the statute the plaintiff is not required to furnish samples of its cosmetic preparation, or the formulas thereof.

4. If the said Chapter 109 of the Public Laws of the State of Maine were unconstitutional, plaintiff would have no adequate remedy at law, and it would be entitled to the injunction prayed for.

5. Said Chapter 109 is not in violation of the Constitution of the State of Maine or of the United States.

6. The defendants are entitled to a denial of said motion of plaintiff for an interlocutory injunction, and to a final decree dismissing the complaint, with a single bill of costs.

[fol. 97] Scott Wilson, U. S. Circuit Judge. John A. Peters, U. S. District Judge. Hugh D. McLellan, U. S. District Judge.

[fol. 98] [File endorsement omitted.]

[fol. 99] In United States District Court, District of Maine, Southern Division

Bourjois, Inc., Plaintiff,

vs.

Clyde R. Chapman, George W. Leadbetter and George H. Coombs, Defendants

Order Denying Interlocutory Injunction and Final Decree—Filed October 7, 1936

This cause came on to be heard on January 3, and June 24, 1936 on the motion of the plaintiff for an interlocutory injunction suspending or restraining the enforcement, operation, or execution of Chapter 109 of the Public Laws of 1935 of the State of Maine by restraining the action of the defendants above mentioned (officers of the State of Maine) in the enforcement or execution of said Chapter 109 of the Public Laws of 1935 of the State of Maine, and said motion for interlocutory injunction having been heard before this Court on due notice and said motion for interlocutory injunction having been pressed to a determination before

[fol. 100] this Court, and it having been stipulated by counsel for the respective parties at the end of said hearing on the motion for interlocutory injunction that the order or decree of this Court on said motion for interlocutory injunction shall also be the final order or decree herein, now then it is concurrently

Ordered, Adjudged and Decreed that plaintiff's said motion for interlocutory injunction be and the same herewith is denied, and the bill of complaint shall be and herewith is dismissed, with a single bill of costs in favor of the defendants.

Scott Wilson, U. S. Circuit Judge. John A. Peters, U. S. District Judge. Hugh D. McLellan, U. S. District Judge.

Seen and agreed to by plaintiffs in point of form only and for express purpose of appealing herefrom.

Verrill, Hale, Booth & Ives, Attys. for Plaintiffs.

The within named defendants assent to within decree in point of form.

Ralph W. Farris, Ass't Atty. Gen., Atty. for Defendants.

Sept. 30, 1936.

[fol. 101] [File endorsement omitted.]

[fol. 102] In United States District Court

[Title omitted]

Petition for Appeal—Filed October 15, 1936

To the Hon. John A. Peters, Judge of the United States District Court for the District of Maine, Southern Division:

And now comes Bourjois, Inc., the plaintiff in this cause, by Verrill Hale Booth & Ives, its solicitors of record, and feeling itself aggrieved by the order and final decree and judgment of this Court, denying an interlocutory injunction on behalf of plaintiff and finally dismissing the com-

plaint herein, said order and final decree and judgment having been made and entered on the 7th day of October, one thousand nine hundred and thirty-six, said plaintiff hereby prays that an appeal may be allowed to it from said order and final decree and judgment to the Supreme Court of the United States, and in connection with this petition, petitioner herewith presents its assignment of errors.

Petitioner further prays that the security for costs on the appeal herein be fixed in the sum of Five Hundred Dollars.

Dated October 15, 1936.

Verrill, Hale, Booth & Ives, Solicitors for Plaintiff-Appellant. Mock & Blum, of Counsel.

[fol. 103] [File endorsement omitted.]

[fol. 104] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL—Filed October 20, 1936

The plaintiff having appealed from the order and final judgment and decree made and entered in the above entitled cause on the 7th day of October, one thousand nine hundred and thirty-six, said appeal is allowed as prayed, and issuance of citation is ordered, said citation to be returnable within forty days from the date hereof.

Security for costs on appeal herein shall be and herewith is fixed in the sum of Five Hundred Dollars and the bond filed by plaintiff concurrently with said petition for appeal is herewith approved of.

Dated October 20, 1936.

Scott Wilson, Judge United States Circuit Court of Appeals. John A. Peters, U. S. District Judge. Hugh D. McLellan, U. S. District Judge.

[fol. 105] [File endorsement omitted.]

[fol. 106] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed October 15, 1936

Now comes the plaintiff-appellant, Bourjois, Inc., by Verrill, Hale, Booth & Ives, its solicitors of record, and in connection with its petition for appeal, it states that in the record, proceedings, and in the order and final decree and judgment aforesaid, denying plaintiff's motion for an interlocutory injunction and finally dismissing the complaint herein, manifest error has intervened to the prejudice of the appellant, to wit:

1. The Court erred in denyng an interlocutory injunction and a permanent injunction suspending or restraining the enforcement, operation or execution of Chapter 109 of the Public Laws of 1935 of the State of Maine.

2. The Court erred in holding that said Chapter 109 was not in violation of the Constitution of the United States of America.

[fol. 107] 3. The Court erred in holding that said Chapter 109 of the Public Laws of 1935 was not in violation of the Constitution of the State of Maine.

4. The Court erred in holding that said Chapter 109 was an inspection law.

5. The Court erred in holding that the State of Maine could compel the plaintiff to apply for a certificate or certificates of registration under said Chapter 109.

6. The Court erred in holding that the State of Maine could compel the plaintiff to pay the fee specified in said Chapter 109 for securing a certificate of registration or the renewal thereof.

7. The Court erred in holding that the State of Maine had any power to compel the plaintiff to pay any fee or fees to be used by the Department of Health and Welfare of the State of Maine for carrying out the purposes of said Chapter 109.

8. The Court erred in holding that the State of Maine had the authority to compel the plaintiff to do anything or

to make any payment as a condition precedent to the sale of plaintiff's products in intrastate commerce in the State of Maine.

9. The Court erred in not holding that the fees specified in said Chapter 109 could be exacted only from the vendor of the cosmetic preparations specified in said Chapter 109, who was selling said cosmetic preparations in intrastate [fol. 108] commerce in the State of Maine, or from the person who was holding the same for sale, or was offering the same for sale, in said intrastate commerce.

10. The Court erred in not holding that said Chapter 109 was a registration law, as distinguished from an inspection law.

11. The Court erred in holding that the State of Maine could require a fixed payment per cosmetic preparation from the plaintiff or any other person in order to secure a certificate of registration under said Chapter 109, or a renewal of said certificate.

12. The Court erred in not holding that said Chapter 109 was an unlawful and unconstitutional burden on interstate commerce between the several States of the United States of America.

13. The Court erred in holding that the "original package" doctrine did not extend to the instant case.

14. The Court erred in not holding that the State of Maine must install an accounting system so as to separate the expenses required in administering said Chapter 109 with reference to cosmetic preparations produced outside of the State of Maine and shipped in interstate commerce to and within the State of Maine, from the expenses required in administering said Chapter 109 with reference to cosmetic preparations produced within the State of Maine and sold within the said State in intrastate commerce, and without ever having been shipped outside of the State of Maine.

[fol. 109] 15. The Court erred in not holding that the State of Maine must install an accounting system so as to separate the expenses required in administering said Chapter 109 relative to beauty shops, barber shops, hair dressing establishments or similar establishments located

within the State of Maine, as distinguished from the expense of administering said Chapter 109 relative to cosmetic preparations manufactured outside of the State of Maine and shipped to the State of Maine in interstate commerce.

16. The Court erred in holding that the plaintiff had to offer any evidence in order to show that the fees fixed by said Chapter 109 were excessive.

17. The Court erred in not holding that the search and seizure provisions of said Chapter 109 were contrary to the Constitution of the United States of America and contrary to the Constitution of the State of Maine.

18. The Court erred in not holding that said Chapter 109 was contrary to the Constitution of the United States of America and of the State of Maine, in that said Chapter 109 provides for the denial of a certificate of registration wholly as the result of ex parte proceedings.

19. The Court erred in not holding that said Chapter 109 was contrary to the Constitution of the United States and the Constitution of the State of Maine in that said Chapter 109 provides for the denial of the renewal of a certificate of [fol. 110] registration, wholly as the result of ex parte proceedings and without the right of review.

20. The Court erred in not holding that said Chapter 109 was contrary to the Constitution of the United States of America and the Constitution of the State of Maine in that said statute is discriminatory because it does not require the registration of household soaps and toilet soaps unless such soaps were represented by the manufacturer or producer thereof as a preparation for the treatment of disease.

Wherefore Bourjois, Inc. prays that said order and final decree and judgment be reversed, with directions to said Court to grant a permanent injunction restraining the enforcement, operation, and execution of said Chapter 109.

Bourjois, Inc., by Verrill, Hale, Booth & Ives, Solicitors. Mock & Blum, of Counsel.

[fol. 111] Wherefore the plaintiff-appellant prays that the final decree and judgment of this Court entered herein on the 7th day of October, one thousand nine hundred and

thirty-six, may be reversed, with directions to grant an injunction suspending and restraining the enforcement, operation, or execution of said Chapter 109.

Verrill, Hale, Booth & Ives, Solicitors for Plaintiff.
Mock & Blum, of Counsel.

[fol. 112] [File endorsement omitted.]

[fols. 113-116] Citation, in usual form, showing service on Ralph W. Farris, filed October 30, 1936, omitted in printing.

[fol. 117] In United States District Court, District of Maine

Bourjois, Inc., Plaintiff,

vs.

Clyde R. Chapman, George W. Leadbetter and George H. Coombs, Defendants

Statement of Evidence

John Bartholomew, a witness called on behalf of the plaintiff, having been duly sworn, testified as follows in answer to interrogatories propounded.

Direct examination.

By Mr. Blum:

My name is John Bartholomew, I am 59 years of age, I reside at 34 South Goodman Street, Rochester, New York; occupation, chemist. My title is Assistant Secretary of plaintiff, Bourjois, Inc.

I have been employed by Bourjois, Inc. and its predecessors in business for twenty years.

I have been engaged as a chemist in the field of cosmetics for twenty years.

The principal place of business of my company is located at the present time in New York.

During the last twenty years the principal place of business of my company and its predecessors has been located in New York.

[fol. 118] Up to the present time and during the last twenty years the cosmetics and perfumes put out by plaintiff and its predecessors have been shipped in sealed containers.

These sealed containers or bottles have been the ones which were ultimately sold in retail stores to retail customers.

Plaintiff sells its cosmetics and perfumes in the State of Maine, and it has been doing this over ten years to my knowledge, possibly twenty.

Plaintiff employs and it always has employed salesmen. These salesmen have gone throughout the country taking orders for the products of plaintiff and its predecessors. That has always been the practice. The order is approved at the home office somewhere in New York State, and that has always been the practice. Then if the order is approved of in New York State these sealed containers are shipped in interstate commerce to Maine or whatever State the order is taken. That has always been the practice.

Plaintiff intends remaining in business.

I know the formulas of some of the cosmetics which have been sold by plaintiff in the State of Maine and elsewhere throughout the United States.

They are in the knowledge of from three to four people and these employees have been in the employ of the company for many years and we consider them to be trustworthy and such people would not use that information on the outside. Such knowledge is limited to four people.

[fol. 119] In order to prevent the general run of workmen and employees from knowing these formulas, these formulas are made up in one part of the building and blends in another part of the building. Perfume formulas, which are the verbal ones of course, are made by *by* the four people that I spoke of before.

It is impossible for a general workman or employee of plaintiff to know these formulas in any manner.

It would be impossible to operate plaintiff's business without the formulas.

If they become known we would have the competition of a half dozen people,—we would have the competition of hundreds.

I would estimate that the value of these formulas to plaintiff is in excess of $100,000.

The gross business done by plaintiff in the United States during the last five years has been from three to four million dollars a year.

As the result of my experience in this business for the last twenty years, I have never heard of a perfume being harmful in any manner whatsoever.

I have never heard of any perfume that has been sold in this country for the last twenty years, including the perfume of plaintiff and the perfume of competitors of plaintiff, which has ever been harmful in any manner.

As to my experience, the effect of these perfumes by myself and my associates and the models that we try our preparations on, I should say the perfumes are absolutely harmless and I think that I might say that could be a general [fol. 120] statement as applied to perfumes.

In the use of perfumes by women they are frequently applied to the skin.

Referring to the other preparations which have been put out by plaintiff in this country and elsewhere during the last twenty years, I should say none of such perfumes have ever been harmful in any manner.

By Mr. Blum: It is conceded that the box of face powder which I produce represents the "Evening in Paris" face powder, which is now being sold by the plaintiff in the State of Maine and elsewhere throughout the United States and which has been sold by the plaintiff Bourjois, Inc., in the State of Maine and elsewhere throughout the United States for at least two years.

I ask that these exhibits be marked as "Plaintiff's Exhibits 1," this being marked "Naturelle"; No. 1-a, this being marked as "Rachel No. 2"; No. 1-b, this being marked as "Tan Parisian"; No. 1-c, this being marked "Ocre Chair"; No. 1-d, this being marked "Rachel"; No. 1-e, this being marked "Ocre"; and No. 1-f, this being marked as "White". These exhibits which are now being offered in evidence are offered to the inspection of opposing counsel and he is requested and authorized to take any portions of any of said exhibits in order to have same analyzed and to determine whether or not any of said exhibits contain anything injurious or harmful in any manner.

[fol. 121] The witness further testified:

These seven exhibits represent the base of the line of face powders which have been put out by plaintiff in the United States and in the State of Maine during the last twenty years.

Referring to Plaintiff's Exhibits 1-1-f, "Tan Parisian" Exhibit 1-b, this is a dark shade for very dark skinned people, and Exhibit 1a, "Rachel No. 2" would be used for skins of a lighter shade, Exhibit 1-a "Naturelle" is the French translation for Natural, and is used for the so-called natural color of the skin. Exhibit 1-f "White" is used to give a white effect on the skin. Certain women to establish an ensemble use White powder to get the basis for the ensemble. Exhibit 1-d "Rachel" for light brunettes, Exhibit 1-e "Ocre" would be used for medium brunettes, Exhibit 1-c "Ocre Chair" (flesh ocre) uses a combination of Naturelle and Ocre.

The coloring matters used in the face powders would be insoluble pigments as well as some soluble colors, or you might say harmless soluble colors. In this connection the color percentages may range from 1 in 100,000 to 1 in 5,000,000, making a possibility of irritation impossible.

Talc is an ingredient which is generally used in manufacturing face powders, for twenty years.

Face powders in general are made of oxide of zinc, stearate of zinc, titanium dioxide, palmitate of zinc, boracic acid, magnesium carbonate, rice starch.

The solid base of a face powder generally consists of these ingredients according to the modern practice of the trade.

[fol. 122] From 1928 on the solid ingredients of face powders as made and sold in the United States by plaintiff company and other concerns have consisted of these ingredients.

Titanium dioxide is a white pigment.

Zinc oxide is also a white pigment.

Other ingredients that have been generally used in the trade, including plaintiff, from 1928 on for giving the various shades of color to a face powder, and which are not trade secrets, are the various oxides of iron, certain harmless soluble colors in low percentages.

These soluble colors are not aniline derivatives or amines.

These soluble colors which are generally used by the trade in coloring face powders are trade secrets.

A harmless soluble color which is used by some concern other than plaintiff is erythrosine.

During my twenty years' connection with plaintiff no proceeding has ever been taken to my knowledge against the products of plaintiff by any governmental authority in the United States on the ground that these preparations are harmful.

If such proceeding would have been started I think it would have come to my attention.

Referring to the general trade practice, I should say that the trade generally has not used aniline dyes or amines for coloring face powders. I might qualify that in this way: Colors are used in very minute proportions—soluble colors especially—and it might be that a small percentage of im- [fol. 123] purity in 100 per cent color might be considered to be troublesome when it was made into the face powder. For instance, you might have 1 in 100,000 when it is made up into the mass, the element of risk is negligible.

Take a color of maximum darkness according to the samples I have produced. I should say it has 1 per cent of insoluble colors such as iron oxide.

I have mentioned a number of ingredients as being commonly used in the manufacture of face powder. Dusting powders for the use of children and the like are not the same composition. They have the same ingredients I have mentioned.

All those ingredients that I mentioned are U. S. Pharmacopoeia. All the standard houses use Pharmacopoeia as the standard where possible. In our case, we give it the standard examination for deleterious substances, like the heavy metals, but where we can buy U. S. P. standard, where it is possible to buy U. S. P., we buy U. S. P. I mean United States Pharmacopoeia.

The effect of the coloring matters which I have mentioned on the skin is only a temporary coloring effect.

This is harmless.

Plaintiff does not put out any toilet preparation or cosmetic which has any chemical effect of any kind.

From my knowledge of the cosmetic business I would say that the dangerous preparations put out in the cosmetic business during the last fifteen years couldn't be more than [fol. 124] one per cent; that is, preparations which would

be deleterious—which would have a deleterious effect, possibly upon the skin.

If a preparation has no chemical effect upon the skin, it cannot be dangerous.

It is safe to say that, according to my general knowledge of the business in the United States, that ninety-nine per cent of the business consists of preparations which have no chemical effect.

That has been the case for a good many years.

Taking for example, perfumes, face powders, creams, lipsticks, and rouges, these preparations do not have a chemical effect.

These are the preparations which are being put out by plaintiff. It does not put out any preparations which exert a chemical effect upon the skin.

Plaintiff does not put out any preparations which have a deleterious effect on the skin, or a chemical effect on the skin.

Plaintiff would not be willing to give the formulas of its preparations to any retailer in the State of Maine who wished to register plaintiff's preparations in the State of Maine.

I should say it is not possible, by any known method of chemical analysis, to take a perfume and analyze it, so as to determine what are the ingredients of that perfume.

I am acquainted with the literature in this field, including the literature relating to the history of perfumes.

[fol. 125] I should say that it is not possible to take a face powder, and by chemical analysis, accurately determine what is in that face powder and make up a duplicate.

I have mentioned something about making tests with plaintiff's products on models, in order to make sure that these preparations were harmless. These tests consisted of the usual usage of the preparation, or as the preparations would be used normally by a woman.

In order to determine whether a face powder or other cosmetic is harmful, it is not necessary to know the formula, as the harmfulness or harmlessness can be determined by actual test.

If the State of Maine wished to determine whether plaintiff's face powder was harmful, the authorities of the State of Maine could determine that by buying some of plaintiff's

face powder in the open market and making the same tests that we made.

This applies to all plaintiff's preparations.

The ingredients generally used in making lipsticks are carmine, paraffin, that is, the soft paraffin, hard paraffin, beeswax, white beeswax, and certain colors which are sold by the manufacturers under trade names or numbers, which we have to buy.

Carmine has its source in an insect. It is insoluble in water.

The ingredients generally used in the industry in making rouges are talc, kaolin, rice starch and zinc oxide, titanium dioxide, also certain colors which are purchased from manufacturers under trade names or numbers, guaranteed to us as being free from heavy metals and any other deleterious ingredients.

[fol. 126] None of the ingredients which I have mentioned for lipsticks and rouges are harmful in any manner.

The same applies generally to the creams which are sold and manufactured in the industry.

Barring freckle creams, things like that, perhaps. It is a very small percentage.

Cross-examination.

By Mr. Chapman:

I state that, from my experience, it is impossible to analyze a perfume.

"X Q. 184. And you also state that you have never tried it?

"A. Well, it is now—I will qualify that in this way: that is really synthesis.

"X Q. 185. What is that?

"A. Synthesis, the building up, as opposed to analysis. The manufacture or the duplication of a perfume would be the building up or the synthesis of a perfume, from an idea; to break down a perfume, and get the ingredients, in my opinion, would be impossible, without some knowledge of the formula. If one had half a dozen ingredients and knew them to be there, you could make a start, but that is a knowledge that has been attained through some previous course."

The possible number of ingredients in a perfume are up to forty or fifty ingredients.

As an example, these aldehydes, you use them one in one hundred thousand, and I will demonstrate such a thing, and if you get one in one hundred thousand and at that point a fair amount of odo it is a physical impossibility or a chemical impossibility to separate that aldehyde from the mixture.

None of plaintiff's cosmetics has any chemical effect on the skin.

I stated that to the best of my knowledge.

[fol. 127] Plaintiff does not manufacture a freckle cream.

I did state that a freckle cream did have a chemical effect on the skin. The formula which is known, I might say, the general knowledge, is in my opinion a harmful preparation.

I would consider a freckle cream to be a harmful preparation.

It is sold on the market.

Plaintiff does not manufacture any sort of a cuticle remover, or softener.

We have the Barbara Gould line. I will tell you frankly, I am not sure whether we make a cuticle remover or not. I would have to ask. I am just a little in doubt about that, but I can know that tomorrow. I don't like to say we don't manufacture it, because there are some preparations, we have a very small sale on, which is so trifling that I don't even come in contact with it. Now, I can know that, whether we make cuticle remover or not, tomorrow, and the formula, that formula we can produce. I don't care anything about that at all.

No product put out by plaintiff contains aniline to my knowledge. We have to buy certain things under numbers.

The coloring matter which produces the red shade or tone is erythrosine.

I do not think it is an aniline. We have never thought anything about it. The reason we never thought anything about it is because it is permitted by the United States Government in foodstuffs.

[fol. 128] Redirect examination.

By Mr. Blum:

Plaintiff has never manufactured a hair dye.

It puts out at the present time a hair tonic.

There is no aniline coloring matter in that hair tonic and no amine.

Plaintiff does not put out any preparation for the hair which contains any aniline derivative or any amine.

[fol. 129] BERNARD M. DOUGLAS was thereupon called as a witness, and having been duly sworn, testified as follows:

Direct examination.

By Mr. Blum:

My age is 67. I am vice-president and treasurer of Bourjois, Inc.

I have had 49 years experience in the United States and in France, in the cosmetic and perfume business. I started at 18 years of age.

This experience has included continuous merchandising. As to compounding, well, I didn't do it physically, myself. I was present at the general compounding for many years.

I have been connected with the business of Bourjois, Inc., and its predecessor in business about forty years.

I have been connected with the house of George Borgfeldt & Company. They were the sole importers, agents and distributors for Bourjois, for about twenty-five years before Bourjois sent over their own representatives here, and started their own business.

There is in France what is known as the parent house of Bourjois, Inc., the plaintiff in this case. Its name is Bourjois.

I have had about 40 years of total experience, approximately, in connection with the Bourjois line in the United States, including the period of my connection with George Borgfeldt & Company.

During this period of forty years, the principal Bourjois [fol. 130] items that have been sold in the United States in the cosmetic and perfume industry have been Java powder, Manon Lescaut Powder, and perfumes, general rouges, under various names and numbers; lipsticks, eyebrow pencils, creams.

The Bourjois products have been sold in the State of Maine, both by Bourjois, Inc., and by its predecessor, by George Borgfeldt & Company, about forty years.

During this period of forty years I have never heard of a single case of damage, or alleged damage, to any person in the State of Maine, by reason of the use of any of the Bourjois cosmetics or perfumes, not to the best of my recollection.

"D. Q. 15. Has any complaint ever been made through this period of forty years by anybody in the United States claiming any deleterious effect whatever by reason of the use of any of the Bourjois preparations?

"A. Yes.

"D. Q. 16. Any such complaint ever made in the State of Maine?

"A. No."

During this period of forty years, the Bourjois business in the United States has been a large one.

As far as I can remember one complaint has been received during this period of forty years.

It was made about fifteen years ago.

A woman in North Dakota, claimed that Java powder hurt her eyes. On investigation, it was found that she had used a large puff, powdered her entire face, and did not close her eyes while she was doing it, and got a lot of powder in her eyes, setting up a conjunctivitis, and other little eye troubles, and we had to explain that we did not put it [fol. 131] out for that purpose, to be used in the eyes, or insert it into the eyes. That was all dropped.

This eye trouble was due to a natural irritation.

An irritation followed by insertion of a large quantity of dusty matter into the eyes.

Plaintiff does not put out any hair dyes. It has never put them out.

Referring to the face powders which have been put out in the Bourjois line, and which are now being put out in the Bourjois line in the United States, and without revealing any trade secrets. The base ingredients which are used in such face powders as far as I know, are talcum, chemically pure zinc oxide, perfume, various perfumes, coloring matter.

We have not used, and we do not use any coloring matter except certified colors which are permissible under the rules and regulations of the Federal Government and of the vari-

ous states. As far as I know we only use properly certified colors.

During the entire period that I have been connected with the Bourjois line, no complaint has ever been made by any State or Federal agency in the United States, that the Bourjois line included a misbranded or injurious product.

The various formulas which are now being used by Bourjois, Inc., and which were used by them prior to December, 1933, have always been trade secrets.

The formulas are locked up in safes, and when a batch has to be made up, the formula is taken from the safe, the batch is made up according to the formula, and the formula [fol. 132] is returned again to the safe, locked up, and then only certain people handle them. Usually one person during his life handles the formulas.

The secret could not be learned from a sample.

During the last five years, annual actual sales of the Bourjois products in the United States, on the average have been about $4,000,000.

I consider the value of our secret formulas on July 1, 1934, and thereafter, was more than $1,000,000. More than that.

That would be true during the last five years, continuously.

"D. Q. 109. Now, during the last five years, what have been your average sales of cosmetics in the State of Maine?

"A. You mean direct sales, or total sales?

"D. Q. 110. Total sales of Bourjois products, Bourjois cosmetics in the State of Maine?

"A. About, as far as we can figure, about $40,000.

"D. Q. 111. That is per annum?

"A. Per annum.

"D. Q. 112. And what has been your average percentage of profit during this period of five years?

"A. Net?

"D. Q. 112. Yes.

"—. About five per cent.

"D. Q. 114. During the last five years, has your company sold its cosmetics to chain stores, which have stores located in the State of Maine?

"A. Yes."

During the entire history of the Bourjois business in this country, and up to the present time, the office and principal place of business of Bourjois has never been located in the State of Maine.

During the last five years, and at the present time, the office, plant, and principal place of business of Bourjois has been located in New York.

During the last five years and up to the present time, plaintiff has solicited orders from retailers located in the [fol. 133] State of Maine, by means of salesmen.

During this period it has solicited orders from jobbers located in the State of Maine by salesmen.

These orders have always been approved of in our home office in the State of New York, prior to the acceptance of such orders.

The merchandise, the cosmetics, have always been shipped from the State of New York in original sealed containers to the State of Maine.

Those original sealed containers have been the ones which are sold by the retail stores, to retail customers. As far as I know, our face powders, lipsticks, compacts, rouges, and the like, have always been sold in original packages, intended to be delivered to the retail customer.

During my long experience in this industry, I have been generally acquainted with the cosmetics, which have been put out by the principal competitors of Bourjois, such as Houbigant, Yardley, Coty and other houses.

"D. Q. 127. What can you generally state as to the harmfulness or harmlessness of cosmetic preparations, as the same have been manufactured or sold in this country during the last forty years?

"A. As far as I know, every standard house exercises the greatest care in all the material used in its manufacture. Does that answer your question?

"D. Q. 128. Has that care resulted in putting out products which are absolutely harmless?

"A. Yes.

"D. Q. 129. Now, please state the loss of business and good will to your company if it were stopped from selling its cosmetics in the State of Maine. Please state whether it would be greater than $10,000.

"A. It would.

"D. Q. 130. How much greater than $10,000 would it be, as far as you can reasonably estimate? Give your best estimate.

"A. Repeat that question, please.

"(The question was read by the reporter as above recorded.)

"A. $25,000—I can't answer that question.

[fol. 134] "(At this point a short discussion ensued off the record.)

"D. Q. 131. Will you accept the sum of $25,000 for stopping your business in cosmetics in the State of Maine?

"A. No.

These catalogues represent our present line, and our line as it existed during the year 1933.

"By Mr. Blum: I offer these catalogues in evidence as Plaintiff's Exhibits 2-A and 2-B, respectively.

(The documents referred to were received in evidence and marked Plaintiff's Exhibits 2-A and 2-B.)"

Cross-examination.

By Mr. Chapman:

"X Q. 139. Now, you spoke about your predecessors in business. Who are the predecessors of Bourjois, Inc., or who were?

"A. Well, as to representation, there was a house called George Borgfeldt & Company.

"X Q. 140. And that is no longer in existence?

"A. Well, not in this business. It is drying up; it is a German house, you understand. It was a house that imported principally German goods, but really they had offices all over the world, and they imported from all over the world. They have a large office in France, and through the agents of their French representatives, they got the agency for representations for sale in this country. They were not predecessors as to manufacture. They were only predecessors as to the purveying of merchandise for Maine."

Plaintiff has been incorporated for about sixteen years. I spoke about Bourjois in France as being the parent com-

pany. Bourjois in France controls Bourjois in the United States.

"X Q. 144. Well, as to the ownership of stock?

"A. I don't know. No, no, they don't. Well I don't know how much stock Bourjois—no, I don't think they have a control. It is a company on the open market, and the stock is sold all over."

[fol. 135] Bourjois, Inc. in the United States controls other companies.

"X Q. 146. What other companies?

"A. It controls Barbara Gould, doesn't it? Surely. By 'control,' do you mean control of manufacture or control of business?

"X Q. 147. Control of the business.

"A. No, I don't think that they control Barbara Gould, either.

"X Q. 148. You would not say that Bourjois, Inc., of the United States owned a controlling interest in the Barbara Gould Corporation?

"A. I wouldn't say so, no.

"X Q. 149. You do not know?

"A. No, I do not know. I am not a stockholder in either company.

"X Q. 150. You spoke about the complaint made by the woman in North Dakota.

"A. North Dakota. I think it was in Fargo.

"X Q. 151. Yes.

"A. Yes.

"X Q. 152. You had no first-hand information on what caused the irritation in her eyes, I suppose?

"A. Why, yes, certainly, I looked into the matter.

"X Q. 153. Personally, you mean?

"A. Well, no, by correspondence. I have been in a great many of those matters by correspondence, because I take an interest in such matters. I always have. This woman had purchased the powder in the store, and she had registered a complaint with them that, after the use of Java Powder, she had a great deal of trouble with her eyes, so I asked them to make an investigation. She had gone to a general practitioner there, and he said, 'Certainly that Java Powder caused this irritation.'

"So then I asked for all the facts in the case, and recited at length, and it appears that the lady had been using a large powder puff—these swan's-down powder puffs which were in use much more than those now—and she dusted it all over, just like probably your wife dusts her back, or something, with powder. Why, when she did that, she still wanted to see the effect she was producing and she kept her eyes open. Naturally, she got a lot of powder in her eyes. Naturally, there was an intense irritation set up. Naturally, she hollered that the irritation was caused by the powder she was using, which was true. We got in touch with the doctor, and called it to his attention—and called his attention to the fact that we do not prepare Java Powder for injection into the eyes, and he agreed with us, too, that perhaps the lady had been a little careless, and that the subject had better be dropped.

[fol. 136] "The answer was—I have forgotten it—it was of no importance, but when you asked me the question, I tried to tell the truth. I have a little habit like that. He asked if there had been a complaint, and I said there had been. I saw the doctor here (indicating Dr. Campbell) stiffen up.

* * * * * * *

"X Q. 157. You spoke about the coloring matters used in your cosmetics?

"A. Yes, sir.

"X Q. 159. As being certified colors of the Federal Government and of the different States—was that your answer?

"A. Yes, sir."

I have some familiarity with the certification laws of the different States with respect to coloring materials, as I have a brochure of a great many pages in my office on the subject, and it is of the different States. Now, I have the Governmental one.

The different States have different regulations, not in conformity with the Federal.

"X Q. 163. I do not know, but I understood your answer to be that it covered the certification requirements of the different States.

"A. No, my answer was intended to apply to the Federal.

"X Q. 164. Yes?

"A. Because I don't know now if the different states have their individual requirements. I doubt very much if it is so."

• • • • • • •

"X Q. 170. Did I understand you to say, Mr. Douglas, that the products of your competitors——

"A. Yes.

"X Q. 171. (Continued.) —are all harmless?

"A. As far as I know—is this a statement for the record?

"X Q. 172. Yes.

"A. As far as I know, all our principal competitors take extreme care in the selection of their raw material and in the handling of it, because after a house has been in business twenty-five, thirty, or forty years, and they have spent millions of dollars in advertising, and building up a big factory, and a big business, it would be very, very foolish to risk all that by turning out merchandise that could be harmful or is inferior in any way.

[fol. 137] "X Q. 173. Your answer, then, to Mr. Blum's question was based entirely upon that reason?

"A. Absolutely, and my knowledge—I happen to know personally all the principals of our competing houses.

"X Q. 174. And they are men of integrity?

"A. Absolutely.

"X Q. 175. And you are basing it——

"A. (Interrupting.) On my knowledge of their integrity.

"X Q. 176. Yes.

"A. And good business judgment, common sense.

"X Q. 177. You say that you would not take $25,000 to stop your business of cosmetics in Maine?

"A. Not if I owned the business, I wouldn't.

"X Q. 178. Has an offer of any amount ever been made to your company?

"No, sir."

[fol. 138] [Title omitted]

Louis E. Weiner, a witness for the plaintiff having been duly sworn, testified as follows:

Direct examination.

By Mr. Blum:

I am thirty-five years old and manager of Rines Brothers Department store, located in Portland, Maine.

I have been connected with that concern for six years.

To the best of my knowledge from the time I came to the store this concern has continuously sold Bourjois cosmetic preparations until very recently and I have seen their merchandise on sale in the store.

Our store ordered this merchandise mostly direct from the salesman; but sometimes we would replenish our own requirements by ordering direct or sending the order to the New York office and the merchandise arrived in regular packages in about the same manner we sold it except it was shipped in cartons.

I am almost sure usually the merchandise would be shipped to our store from New York. We never received any from Maine.

[fol. 139] When we sold these preparations in our store we sold them in the original packages or containers in which the same were shipped from New York.

Our store at the present time is not handling or selling Bourjois Cosmetic preparations in this state because we understood according to this new cosmetic law we could not sell cosmetics that were not registered; and we were given to understand that Bourjois was among those not registered.

I signed this letter except what is included in the upper left hand corner and sent it to the sales corporation of the plaintiff.

(Letter dated May 29, 1936, from Rines Brothers Company to Bourjois Sales Corp., signed by L. E. Weiner, marked "Plaintiff's Exhibit No. 1" for identification.

Mr. Blum: I offer this letter in evidence as Plaintiff's Exhibit No. 1, with the understanding that the notations in

the upper left-hand corner were made by the office of the plaintiff company.

Judge Wilson: Has opposing counsel seen the letter?

Mr. Blum: They have a photostat copy of it.

Judge Wilson: What are the notations on the letter?

Sales of Bourjois preparations to this concern in 1934 and 1935; and the letter which I will read to the Court, is as follows:

"May 29, 1936.

Bourjois Sales Corp., 35 West 34th St., New York City.

GENTLEMEN:

Mr. Nelson Liset, your representative was here. We could not place an order for our requirements on account of the State Law against the sale of cosmetics which are not licensed.

We obviously could not handle goods that are not li- [fol. 140] censed; therefore, we could not place an order. We are just calling this to your attention as you probably wondered why you have not received any replenishment orders from us.

Yours very truly, Rines Brothers Company, L. E. Weiner.

L. E. Weiner.
BW."

This letter correctly stated the reasons why our store refused to handle Bourjois cosmetic preparations which was one of lots of lines we carried for a long time and was a fairly good seller.

We would continue to carry and sell this line if it were not for the existing cosmetic law.

Mr. Blum: Direct Examination closed.

Mr. Farris: I object to the exhibit offered unless the notations on the letter are struck out.

Mr. Blum: We could do that personally and I think the letter would not include the notations in the upper left-hand corner of the letter.

(Notations in upper left-hand corner of Plaintiff's Exhibit No. 1, struck out by Mr. Blum.)

Cross-examination.

By Mr. Farris:

The orders shipped to us from this plaintiff were in one or two dozen cartons put in one large carton. Then each individual package from that container could be put on the counter for sale.

All the goods we bought came in bulk, in one large package and we broke the original package open and placed the goods on our counter in our store.

[fol. 141] We did not sell from the original package the goods were shipped in from New York.

Judge Wilson: A matter of law.

Mr. Blum: Yes, I think so.

Judge Wilson: One of the real issues between you.

We keep these goods after they reach our hands in our toilet goods department, and in the stock department.

We have not ordered recently from the plaintiff because of this law in effect in Maine, but have attempted to comply with this law in registering these articles.

We have not done anything to register these articles of the plaintiff we are going to sell in our store.

I am not broadly familiar with the Maine law in regard to cosmetic preparations but I know the law is in full force and effect and that cosmetic preparations must be registered before we can sell them.

I am selling cosmetic preparations now which to the best of my knowledge are registered.

[fol. 142] Merrill A. Hay, a witness for the plaintiff having been duly sworn, testified as follows:

Direct examination.

By Mr. Blum:

I am 35 and secretary to H. H. Hays Sons, Portland, Maine. Our concern is in the drug business, located at Congress Square and the junction of Middle and Free Streets in Portland, Maine.

I have no accurate knowledge of the term of years but for five or six years anyway our stores purchased Bourjois cosmetic preparations put up by the plaintiff and we got most of it either direct by giving the order to the sales man or by mailing the order to the New York office. The merchandise was shipped to us from the warehouses of the company from New York. In some cases we received boxes or containers which contained these cosmetic preparations, in large shipping cartons, out of which we sold one, two or more of these individual boxes or containers; and we, in Portland, resold the preparations in the original cans or containers which were inside of these shipping containers. Our stores at the present time sell only such Bourjois items as we had on hand at the first of the year in the State of Maine.

Our stores refused to handle the Bourjois cosmetic preparations after the first of the year, with the exception of those in stock prior to the first of the year, because, according to our understanding, the law forbade the sale of any unregistered cosmetics or preparations, and these were unregistered.

[Vol. 143] I am familiar with the signature of Edward A. Hay which appears on this letter.

(Letter dated May 27, 1936, from Hay's Drug Stores to Bourjois Sales Corp., signed by Edward A. Hay, marked "Plaintiff's Exhibit No. 2" for identification.)

He is my father and president of the corporation. This letter states the reasons why our stores have refused to handle the plaintiff's preparations in the State of Maine.

Mr. Blum: I offer this letter in evidence now and I wish to read it to the Court:

Judge Wilson: Any objections?
Mr. Farris: No objections.
Mr. Blum: I will read the letter.

"May 27, 1936.

Bourjois Sales Corp., 35 West 34th Street, New York, N. Y.

DEAR SIR:

Owing to the fact that your products are not registered under the Cosmetic Law of the State of Maine, we regret that we shall be unable to order any of your merchandise

until such time as your House complies with these obligations.

Very truly yours, H. H. Hay Sons, by Edward A. Hay, Treas.

MAH/ce."

In the course of our dealings with Rourjois preparations there has never been, to my knowledge, any time in which we received a single package from New York, like a large assortment or order, which was delivered to the customer [fol. 144] in Maine in the same condition in which we received it from New York.

Cross-examination.

By Mr. Farris:

These cosmetic preparations when they arrive are in lithograph or other corrugated pasteboard boxes or jars labeled in the usual manner of the Company.

I don't mean the shipping cartons—pasteboard boxes for face powder, rouge, lipstick, etc., and compacts which the women carry for the purpose of applying rouge and powder to their faces.

Many of the items are packed in light cardboard, flimsy cartons simply for shipping convenience.

There are perhaps a quarter dozen or half dozen in a package.

These cosmetic preparations of which I am speaking do not sell from the package in which they are shipped in from New York but in individual packages. When something comes to our store from this concern, it is in a big box of some kind. Inside of that, depending upon how many were ordered, there might be some loose articles wrapped in paper. Some things don't move as rapidly as others. Others we sell more of and they are packed in light, pasteboard packages of perhaps a half or quarter dozen. We take these from the large package and place them on our counters for sale.

In these packages which come from New York we have a large quantity of articles,—rouge, powder, lipstick, and the like. We separate them out and put them on our shelves as we need them, and put very little in our stock room. Most of it goes direct to the counter.

[fol. 145] FREDERICK W. RUGG, a witness for the plaintiff, having been duly sworn, testified as follows:

Direct examination.

By Mr. Blum:

I am 56, and am living at the Eastland Hotel. I am the proprietor of the Rugg Drug Store kept in the name of the Whelan Drug Store at 591 Congress Street, Portland, Maine. It is a retail drug store. I have been connected with the retail end of the drug business and cosmetic business for thirty-seven years. I opened my store in Portland, Maine,—approximately May 14, 1936. Prior to May 14, 1936, I heard of the Bourjois line of cosmetic preparations put out by this plaintiff and I certainly consider it a popular and good selling line. For a great many years, I can't say exactly, prior to the time I opened my store in Portland, Maine, I had been connected with concerns selling these Bourjois preparations at retail. When I opened my store in Portland, I did not purchase or stock any of the Bourjois cosmetic preparations secured from outside the State of Maine, due to the cosmetic law existing here.

In conducting a retail drug store there are some times occasions when I order from the manufacturer a single package or item and re-sell the same in its original form to the customer because there might be a special order for an item not regularly carried in stock that we might procure for that particular customer.

I have not known of cases where a single package shipped to the retailer by the manufacturer contained an [fol. 146] assortment of items, and that package was delivered direct to the customer since I have been in Portland.

Since 1899 I have been acquainted with the retail sale of cosmetic preparations in the State of Maine. Prior to the time of opening my business in the city of Portland I was connected with retail stores located in the State of Maine which were selling cosmetic preparations at retail as H. H. Hay's Sons, Portland. I was connected with this concern about eighteen years, beginning 1899.

During the time I was connected with this retail store, with H. H. Hay Sons, in Portland, Maine, I am quite sure there were occasions in which a special item was ordered from an out-of-state manufacturer and such item delivered

to the customer in the State of Maine in the same container in which the same was shipped into the State of Maine.

Prior to this hearing inspectors from the local Department of Health called at my store and made a seizure and put me under arrest. I think it was about June 9th, 1936.

This is a list of the merchandise seized from my store and it includes Bourjois preparations put out by the plaintiff.

Dr. Campbell who is here in Court today was one of the gentlemen who made this search and seizure.

Prior to the time I was arrested and my place searched and a seizure made, nobody, on behalf of the Department of State, asked me personally to register the cosmetic preparations which were seized.

[fol. 147] Judge Wilson: Perhaps I didn't understand the question. I understood the witness to say that they did not ship in any of the Bourjois preparations into Maine since they opened the store.

I secured the Bourjois preparations seized in my store through local jobbers in the State of Maine. I had no means of knowing whether these preparations had been secured by the local jobbers prior to January 1, 1936.

I can't state the name of the jobber with authority but one or two are Cook, Everett & Pennell or J. E. Goold Co., and we are doing business with both houses.

This merchandise was bought of them and bought for sale from them but I am not sure that this particular sale of merchandise here was from them. I cannot tell until I check back the invoices.

Judge Wilson: Who could it be from?

I am not positive who it could be from but they were not from New York. I did nothing that I thought would conflict with the law.

Mr. Blum: Awhile ago, your Honor, you wanted to know how these preparations came from New York to the Store.

(Boxes and cartons produced by Mr. Farris placed before the Court.)

Mr. Blum: Were all these boxes seized at the Congress Street Store?

Mr. Farris: Some of them were; not all.

Mr. Blum: To make this a little clearer to the Court, I offer in evidence some packages which were purported to be part of the merchandise seized from the Congress Street store.

Judge Wilson: Were all of these seized at the plaintiff's place?

Judge Peters: These and some others. Let me look at them.

(The Court examines packages produced by Mr. Farris and to be offered in evidence by Mr. Blum.)

[fol. 148] Judge Wilson: How are these to be marked?

Mr. Blum: I will have the stenographer mark them.

(Box containing bottle of talcum powder labeled "Evening in Paris", Bourjois, marked "Plaintiff's Exhibit No. 3" for identification.)

Mr. Blum: I offer in evidence a paper cartoin which contains a bottle of talcum powder marked Plaintiff's Exhibit No. 3.

Judge Wilson: Entitled "Evening in Paris"?

Mr. Blum: Entitled "Evening in Paris".

Mr. Farris: No. 3?

Mr. Blum: Yes.

Judge Peters: You call that a carton?

Mr. Blum: That is.

Judge Peters: And the carton on the table?

Mr. Blum: That is a shipping carton. The retailer does not receive these smaller ones one by one in individual packages. We admit, however, that in a special order, for an elaborate order, an assortment with elaborate boxes, the original package containing the assortment of powders and rouges is sent to the retailer. Then it is sent to the customer in the same way you can buy cigars by the twenty-fives or fifties which are given to a person.

Judge Wilson: Any objections?

Mr. Farris: None, Your Honor.

Referring to plaintiff's Exhibit No. 3 this shows the manner in which merchandise is delivered to the retail customer, and it is the way they have always been delivered. This exhibit consisting of a paper box and bottle inside is sent to us originally from New York, or wherever it may be, together with similar boxes and bottles, all put together in

one shipping container or carton. That has been the practice in the cosmetic and drug business or industry as long as I can remember.

[fol. 149] Mr. Blum: I offer in evidence another paper carton together with a paper box which contains face powder under the name "Evening in Paris" and ask that it be marked Plaintiff's Exhibit No. 4.

(Box containing face powder marked "Evening in Paris", marked "Plaintiff's Exhibit No. 4," for identification.)

(No objections.)

Referring to Plaintiff's Exhibit No. 4, this shows the usual manner in which this powder was received by us and sold at retail; so that these individual boxes like Plaintiff's Exhibit No. 4 are usually sent to us in large shipping containers, each of these shipping containers having a number of these packages in them.

Mr. Blum: Do your Honors want any more of these smaller packages offered in evidence? We have two more.

Judge Wilson: That is up to you.

Mr. Blum: I think these will be enough.

When the search and seizure were made, Dr. Campbell made a suggestion to me in order for me to keep the merchandise and have the proceedings dropped. He said it might be possible by my making a payment of fifty cents per item to have the matter dropped. Dr. Campbell did not request that I supply him with the formulas of these preparations. He did not ask me to supply specimens of these preparations for analysis.

I do not know the formulas of the various preparations I sell, including the Bourjois preparations, nor do I or my concern own any part of the Bourjois business.

I have not been asked to pay the fifty cents per item in order to have my merchandise released and returned to me and in response to Dr. Campbell's suggestion that I might clear the matter up by paying the fifty cents per item, I have [fol. 150] not accepted his suggestion.

In running an ordinary drug store, we have on our shelves bought of various manufacturers, a very large number of toilet preparations. It would be impossible to give an exact estimate. There are several thousand items.

As a retailer I would not be willing to pay fifty cents per preparation for the benefit of all these different manufacturers and all the other retailers in Maine handling the same preparations.

I could not give the Department of Health and Welfare of the State of Maine any information as to the ingredients and formulas of the various cosmetic preparations including those of Bourjois.

I am not a manufacturer or producer of any cosmetic preparations and never have been in the State of Maine. My concern has never been a manufacturer or producer of any cosmetic preparations in the State of Maine and neither I nor my concern has been the proprietor of any business engaged in putting out cosmetic preparations in the State of Maine, save for our retail sales.

Cross-examination.

By Mr. Farris:

The cosmetics are purchased locally in Portland, Maine. I don't buy of this plaintiff. I am selling for myself, not for any one else or for anyone outside the State of Maine.

I sell direct to the consumer in Maine, direct from my shelves and counters. I am now familiar with the Maine Law of 1935, the Cosmetic Law, passed by the State Legislature. It was in full force and effect on January 1, 1936, [fol. 151] but I was not familiar with this law until after plans were made to open our store. I did not receive notice at all from the Department of Health and Welfare regarding this law. I was shown a clipping from the local papers, Dr. Campbell had with him the day he came to my store. Then I sent a man to see Dr. Campbell in Augusta and then followed out his instructions to the best of my ability. I think as far as I am concerned I have complied with the Maine law as well as any other druggist in Maine.

Judge Wilson: That is a question of law.

I have registered nothing, no preparations. I am not selling any unregistered preparations today in Maine. Those I am selling today are registered under the Act in Maine to the best of my knowledge. I spoke of a special order on direct examination. When I have a special order

for a special customer, I do not put that on my counter. I deliver it directly to the customer in its original container.

Dr. Campbell suggested I could register these articles that were seized and the action would be dropped. That suggestion was made the day they went through the store. It would be impossible for me to give the exact words. I would say I asked him what the procedure would be to straighten the matter and he said he thought it could be arranged if I desired to pay that tax, it would be taken care of at the hearing. He told me, as I got it, that if I registered these goods under the Act, they could be sold legally by me. I understood him to say that these particular proceedings would be dropped if I did that.

[fol. 152] To my knowledge I have no other unregistered preparations for sale on my shelves and in my store besides the Bourjois preparations.

At the time of the seizure there were other unregistered preparations in my store.

I am the manager of my store in Portland.

Mr. Akers is the manager under me, he is an employee. I had him call at the Department in regard to these preparations and he went to see Dr. Campbell personally. He received a list of those that were registered. I was certainly interested enough in the law at that time to send my employee to Augusta to find out about it.

Redirect examination.

By Mr. Blum:

Prior to the time I opened my store in Maine I carefully considered the cosmetic law when I bought my goods and carefully bought in only those items that were registered.

I refused to bring in any Bourjois preparations because they were not registered. I have not purchased or done anything to purchase the Bourjois preparations from the home office of the plaintiff because I believed their sale was illegal in the State of Maine.

Referring to all other retail concerns around me it is general knowledge that they are handling the unregistered preparations of Bourjois, Coty and many others. I can't answer that definitely.

[fol. 153] FELIX E. GUERNIER, a witness for the plaintiff, having been duly sworn, testified as follows:

Direct examination.

By Mr. Blum:

I am manager of M. H. Fishman Co., Waterville, Maine, my age is thirty-two. About three weeks ago I was arrested on the charge of violating the Maine Cosmetic Law, by the Department, and a search and seizure was made at your store. The seizure in my store included Williams S-aving Cream, Williams Shaving Stick, Williams Aqua Velva, Colgate's powder and some vaseline.

These were on sale in my store in the tubes or cartons in the same condition in which they were received from the various manufacturers outside of the State of Maine.

Dr. Campbell, here in Court today was one of the gentlemen who searched my place and seized this merchandise. He said we could register the articles by paying fifty cents on each article that was unregistered. He did not promise to do anything in case we registered these preparations ourselves and paid the fifty cents per preparation. I can't remember what he said exactly, but he said we could register them by paying the fifty cents outselves. He did not ask me for any formulas or anything or for samples.

Judge Wilson: Does the Act ask for formulas?

Mr. Blum: There are no set rules or regulations. The department has formulated no rules or regulations.

Judge Wilson: I didn't understand the law required them to send in such formulas.

Mr. Blum: The statute does say:

[fol. 154] "The said department is authorized to regulate or to refuse the issuance of certificates of registration or to prohibit the sale of cosmetic preparations which in its judgment contain * * *."

Judge Wilson: What section is that?

Mr. Blum: Section 2, your Honor, second paragraph:

"* * * injurious substance in such amounts as to be poisonous, injurious or detrimental to the person."

If all the department does is to take a fifty-cent per item registration fee and hand out a certificate as you would a

postage stamp, it seems to me it is not safe-guarding the public health. It is nothing but a tax law in my opinion. Anybody can pay. The Statute does not say a word about that but, after receiving the fifty-cent fee, they will make an inspection of the merchandise brought in under that trade-name and offered for sale here.

My concern has not offered to pay fifty cents per preparation and my concern is not a manufacturer or producer of the various items referred to, Williams S-aving Cream, Williams Aqua Velva and Colgate's Powder, nor does it own any part of the business of producing these preparations.

[fol. 155] FRANK E. DEAHNA, a witness for the plaintiff, having been duly sworn, testified as follows:

My full name, age, residence and occupation is Frank E. Deahna, Augusta, Maine. I am store manager of The McLellen stores which is a retail store and sells cosmetic preparations at retail in the State of Maine.

A search and seizure has been made at my store in the last two or three weeks and I have been arrested.

Some of the articles or items seized were Colgate's Talcum powder and face powder, Williams Aqua Velva and some three or four other articles. They were in the same bottles and tubes in which the same were received from New York and states other than Maine.

Dr. Campbell, the gentlemen in Court here, was one of the gentlemen who visited my store and assisted in the search and seizure. Dr. Campbell made a suggestion to me as to what I might do in order to avoid this trouble. He said in a general way that we might register the items by paying fifty cents and the proceedings would be dropped. Our concern has not paid these fees of fifty cents per item as suggested by Dr. Campbell. Our concern was not a manufacturer or producer of the various cosmetic preparations that were seized that I know of, nor was it the proprietor of any business engaged in making or selling the cosmetic preparations which were seized. We still have in our store cosmetic preparations which have not been registered in the State of Maine.

[fol. 156] Cross-examination.

By Mr. Farris:

Our goods which we sell at our counters are shipped in large cartons from New York. We take them out of those large containers and place them for sale in our stores. The original package they are shipped in is broken open and they are taken out.

I can't tell you the exact words of Dr. Campbell but he said if we registered these articles they would be dropped and I understood that further proceedings would not be brought against me if I registered these articles.

I am familiar with the Maine law but I don't know if dealers have to register. I am not registered with the Department of Health. I saw a clipping about this law in the paper and I sent my employers a copy of the law and notice from the newspapers. They sent me a letter stating that to the best of their ability they had complied with the law. They did not tell me not to register.

Redirect examination.

By Mr. Blum:

At the time Dr. Campbell made the suggestion about paying the fifty-cent fee per item he did not ask me for any formulas, samples or any information of any kind about these cosmetic preparations. He did not ask me for fifty cents per preparation but he suggested it.

Recross-examination.

By Mr. Farris:

If we desired to register the articles Dr. Campbell said [fol. 157] we would have to submit a specimen—one specimen to determine—before issuing the certificate. I understood it that way.

[fol. 158] Alfred P. Cook, a witness for the plaintiff, having been duly sworn, testified as follows:

Direct examination.

By Mr. Blum:

I am sixty-one, wholesale druggist, Portland, Maine. The name of my concern is Cook, Everett & Pennell. I have

been engaged in the wholesale drug business in Portland, Maine for over thirty years, and my firm has handled wholesale cosmetic preparations at least thirty years. It is fair to say that the selling of cosmetics is a very important part of the business of drug stores and wholesale druggists.

For probably more than ten years I have known of and handled the Bourjois cosmetic preparations, the preparations of the plaintiff, in the State of Maine. It is one of the best—very best—selling lines. I ordered the Bourjois preparations that I sold within the State of Maine either from the New York office or the representative who visits Portland. The merchandise was sent to us in individual containers and cartons like Plaintiff's Exhibit No. 3, for example, these being packed in larger shipping containers for convenience.

Our concern several times has refused to purchase any more of this merchandise from the plaintiff's home office in New York on account of this Maine "Cosmetic Law". This has interrupted a substantial and profitable business which we have carried on for many years in these preparations.

[fol. 159] Cross-examination.

By Mr. Farris:

I am familiar with the Maine Cosmetic Law. I have not registered some of the cosmetic preparations I deal in under that Act.

We may have acted as agent for one firm—in one case and had some articles registered under the Act. It was one preparation or one article—I am not familiar with the details. In general we have not registered anything. I received notice from this department that the law went into effect on the first of January.

Redirect examination.

By Mr. Blum:

I have not taken fifty cents out of my own pocket in any case to register the preparations of out-of-state manufacturers.

Judge Wilson: What concern?

Mr. Blum: Individual manufacturers such as Coty, Bourjois and the like.

We have refused to register the cosmetic preparations of manufacturers. There is only one exception when we acted as agent. I am not quite sure but I think the agent took the money out of his own pocket; but with the exception of this one fifty cents, nothing has been paid in any way, shape or manner.

We thought it the duty of the owner of the preparations rather than the sales organization or dealer as we are. We have sold, I should say between 1,000 and 2,000 brands, certainly over a thousand, so if we wanted to register the various preparations of these manufacturers annually we would have to pay an annual fee of several thousand dollars. I [fol. 160] do not know of any cosmetic manufacturers of any consequence located in the State of Maine but I think there are several small concerns or individuals. It is absolutely true to say that at least 90% of the cosmetics sold in this State, are manufactured by people outside the state of Maine. I think it is absolutely true.

Mr. Blum: May it please the Court and opposing counsel, as previously stated, we are willing to consider this the final hearing in the case.

Mr. Farris: Yes.

Mr. Blum: In addition to the testimony taken today, there is the testimony taken at the previous hearing, the depositions taken in previous cases and admitted by stipulation and also the interrogatories and the answers thereto. Is that correct?

Mr. Farris: Yes.

(Plaintiff rests.)

Mr. Farris: I will be very brief. It is not the intent of the department to interfere with interstate commerce. These seizures brought out in evidence here today were taken from the counters in various stores and were goods offered for sale by dealers in the State of Maine to customers in the State of Maine, and not by any plaintiff outside the State of Maine. We contend, as a matter of law, that these cosmetic preparations, shipped in bulk and broken out and put on the shelves and counters of the various stores, are intrastate and not interstate; and that it is a matter for the Court to decide and not for me to say.

I have one witness, Dr. Campbell.

[fol. 161] ELMER W. CAMPBELL, a witness for defendant, having been duly sworn, testified as follows:

Direct examination.

By Mr. Farris:

I am a resident of Hallowell, Maine. I am with the State Bureau of Health and have charge of the enforcement of the Cosmetic Act, Chapter 109 of the Public Laws of 1935, under direction of the Director of the Bureau. In fact, I have made some seizures under this act in the past two or three weeks. In making these seizures, I have notified the dealers in Maine that this Act would be in effect in 1936. I put a notice in all the newspapers published within the State during the last week in April, 1936. We sent out notices to certain proprietors, dealers and others, which notice is in evidence in the interrogatories and answers we filed. There were numerous letters sent from the office notifying various dealers who have employees. We have required them to submit specimens of the cosmetic preparations for analysis and they complied with the law. After the sample has been received a certificate is issued on the payment of a fee of fifty cents each and a deposit of a sample for registration. Our state chemist makes the analysis. I don't suppose retailers know the formulas in our office and we do not give out the formulas of these different preparations to retail dealers. We do not ask for formulas but analyze the preparations. The Department permits a temporary certificate to be issued upon the investigation and because of the large number issued—excuse me—because [fol. 162] of the large number of preparations, we have issued temporary certificates upon all of the analysis so that there are numerous temporary certificates issued at the present time which will either be suspended if something injurious is discovered or a permanent certificate of registration issued when that preparation is found to be all right. I have heard the evidence as to the seizures made by my department. I saw no goods in bulk or in the shipping packages in the stores. The goods our officers seized were on various shelves, counters, and stockrooms of the stores in question. We talked with the retail dealers who were selling to customers before making the seizures. I did not

tell any of these three witnesses that the proceedings would be dropped if the registration fee was paid. I did not tell those three witnesses that if they complied with the law they would not be molested further by our department. I told them if they wished to register the preparations they could do so by paying fifty cents for each item and sending a sample to the office for analysis. In one particular case I was asked by Mr. Rugg what could be done to prevent these things being retained, or could he get them back, or something to that effect. It was very true that I told him he could register these preparations and that I would lay the thing before the court when the hearing was held, and ask that they be returned to him.

I have not attempted at any time to take goods in the original shipping packages from the retail dealers stores.

[fol. 163] Mr. Blum: If your Honors wish this testimony, that is all right; but any shaving cream that was seized was not the material of the plaintiff, but if your Honors wish to * * *

Judge Wilson: You put on the witness who testified.

Judge Peters: Whose preparation is it?

Mr. Blum: It is not Bourjois.

Judge McClellen: What is the purpose of bringing it in?

Mr. Farris: It is just descriptive of the material seized at the Waterville store. At the Waterville store, they seized what, Doctor?

Williams Luxury Shaving Cream, and Williams Tube Shaving Cream.

A package is one carton containing a metal tube of shaving cream, similar to Exhibit No. 2 of the plaintiff but wider and slightly longer and inside the carton was a tube of cream.

Cross-examination.

By Mr. Blum:

In answer to an interrogatory, it was stated that the Department had not adopted any rules or regulations up to the time such interrogatory was answered, and since these interrogatories have been answered no rules or regulations ~~have been~~ adopted.

I have a list of all those preparations by principal retailers but not separated as to where people live, who have

made these registrations. Assuming that a local retailer would register Bourjois face powder for example, and, before the year was out, the retailer went out of business, it would automatically expire and nothing would be done in that case. We would presumably seize all the Bourjois preparations in the State if it expired.

[fol. 164] "What would you do if a retailer was bankrupt or gone out of business and the registration expired?

Mr. Farris: I object to that question. It seems to me it is a matter of assumption when a matter has arrived at that state of affairs that a man has gone into bankruptcy, as to what the department is going to do.

Mr. Blum: I want to find out—because if a retailer can go ahead and register under the act——

Judge Wilson: It is a matter of argument.

No employees are employed exclusively for the purpose of enforcing the act.

There are three inspectors who give a part of their time to the enforcement of this Act. They have gone into the stores to seize certain preparations under my direction. In this particular connection probably all of them have done this, not just these particular men. We have other employees working on this under the inspectors. These other men have analyzed preparations, that is the samples submitted and they have gone into the open market and purchased a number of preparations for analysis and have analyzed them. I may have neglected to state that inspectors have purchased certain preparations not registered, in various stores.

[fol. 165] Deposition of Dr. Samuel M. Peck taken with reference to Chap. 278 of the Public Laws of Maine 1933, which was repealed by the statute in issue. Said testimony has been included because of its pertinence to the issue in the instant case.

Dr. Samuel M. Peck was thereupon called as a witness, and having been duly sworn, testified as follows:

Direct examination.

By Mr. Blum:

D. Q. 1. Where do you live?

A. 125 East 72nd Street, New York City.

D. Q. 2. Please state your age, residence, and occupation.

A. I am 34, resident of the City of New York; occupation, physician, specializing in dermatology.

D. Q. 3. Please state your education, experience, and special qualifications as connected with the field of dermatology.

A. I began my dermatological training as house physician for Fordyce, who was then the head of the Dermato- [fol. 166] logy Department of the New York City Hospital. Then I became associate pathologist at the Israel Zion Hospital in Brooklyn, where I did the histopathology of the skin. Then I went to the Friedrichshain Krankenhaus in Berlin, where I did pathology, general pathology, with histopathology of the skin. Then I spent four and a half years as instructor in dermatology in the University of Zurich, Switzerland.

Since 1930 I have been adjunct dermatologist at the Mount Sinai Hospital. I was associate dermatologist at the Hospital for Joint Dieases, and for the last year I have been assistant clinical supervisor of dermatology at Bellevue Medical School.

D. Q. 4. You are a physician duly licensed to practice in the State of New York?

A. I am.

D. Q. 5. From what medical school did you graduate?

A. College of Physicians and Surgeons.

D. Q. 6. Please state what you have done, if anything, to make yourself acquainted with cosmetics in general, and their effect upon the skin, as a specialist in dermatology.

A. In the course of the practice of dermatology, the use of cosmetics of course is a daily occurrence, and as such I have had to look into the general ingredients of cosmetics as is given in the ordinary textbooks, and I have had to make up various formulas for my patients, and the question of skin diseases, which may or may not have been due to them, where the question of cosmetics arose. I tried to examine those, to determine the source, if I could, possibly.

Q D. 7. Now referring generally to the cosmetics, including face powders, lipsticks, rouges, face creams, and also including perfumes, please state your opinion as to whether or not such preparations are to be classified as harmful [fol. 167] preparations or whether they are to be classified as harmless preparations for the average user of them?

A. I think in general that, for the average user, they could be classified as harmless.

D. Q. 8. Please state your opinion as to whether or not the use of such cosmetics is beneficial or not beneficial?

A. I think they are beneficial, since in most instances they act as protective elements to the skin. I am not talking about perfumes. Perfumes are not beneficial, and there is no reason why they should be.

D. Q. 9. The preceding witness has referred to the use of a number of ingredients. You were present when he testified as to the ingredients ordinarily used in the manufacture of lipsticks and rouges, and in connection with face powders the witness specified certain ingredients, the list of which I hand you (handing witness document).

A. (Reading.)

D. Q. 10. Please state your opinion as to whether these specifically named ingredients are harmful or harmless.

A. I would say them are harmless, except in certain instances where hypersensitivity of the skin exists. I say that because one of the ingredients that I see here. There is a very small percentage of people who are sensitive, and that would be also true to common things, such as tomatoes or ordinary furs, for instance, that they come in contact with, and even such things as wheat bread, wheat.

D. Q. 11. Which ingredients of the list you have mentioned, or which ingredients are the ones which may be harmful to the sensitive persons?

A. The ones that I see here in my experience that I have found may occasionally give reactions to the skin are rice, starch, boric acid, if used in certain percentages only; he hasn't got perfumes here at all, so I don't have to answer that.

[fol. 168] D. Q. 12. What percentage of the population has the supersensitive skin condition that you have mentioned, about?

A. I would say certainly less than one per cent.

D. Q. 13. How about the effect of perfumes applied to the skin? What can you say as to that?

A. Well, I have had a number of cases of eczemas from perfumes. That is one type of reaction, and that comes to people who are hypersensitive. Another condition, which is not eczema, is known as berelocque dermatitis, which you will occasionally see due to a diffusion of some perfumes

with the perspiration of the skin, in the presence of light. Now, very little is known about the exact mechanism of this, except that bergamot oil has been brought into suspicion.

D. Q. 14. Does that answer apply to the percentage which is listed at less than one per cent?

A. Yes, considerably less than one per cent of the instances, especially the berelocque.

D. Q. 15. Well, is this presence of a very small percentage of hypersensitive people, also true about numerous other articles in addition to perfumes or cosmetics?

A. Oh, yes.

D. Q. 16. Well, mention some articles commonly used or eaten, to which a small percentage of the population are unduly sensitive, so that undesirable reactions are secured.

A. Let us take furs, especially rabbit furs. Let us take food, such as eggs, wheat, rye, shellfish. Is that enough? There is a long list.

D. Q. 17. Would it be your opinion therefore that perfumes and cosmetics are no more harmful than furs, shellfish, rye, wheat, and the other ingredients you have mentioned, taking total percentages?

A. Cosmetics, as you have mentioned that list, as I generally understand the formulas, are about as harmless as those used.

D. Q. 18. The last witness mentioned the use of soluble dyes [fol. 169] for coloring cosmetics, and he mentioned one dye, which has been stated is an aniline derivative. Have you in your possession a textbook which you consider a good textbook, and which lists the soluble dyes generally used in the manufacture of cosmetics?

A. I have one here of importance.

D. Q. 19. And please give us the name of the book.

A. It is "Cosmetics", by Theodore Koller. Do you want the publisher?

D. Q. 20. No, it is not necesary. What is the date of publication?

A. 1920, Scott, Greenwood & Son, London. This is a translation from the German book.

D. Q. 21. Referring to the book to any extent that you may deem necessary, please state the soluble coloring matters or dyes which are generally used in the industry, and have been used in the industry for coloring face powders and other cosmetics.

A. I will read them here; I mean those that he gives. Of course I take it that that is the general coloring matters used. It gives here (reading):

"For the purpose of red coloring matter, a substance called betula alba," and he has yellow coloring matters, "saffron, tumeric and palm oil."

Then he says: "For alcoholic cosmetic preparations," he uses aniline dyes, but they are unsuitable for substances containing fats. And then he says "Carmine" is the chief coloring matter which he recommends, and Carthamin red. Then they use a reddish brown coloring matter, called the ratanhia root. Then they have, finally, brown, which is used by means of caramel, which is produced by means of heating sugar; and black, that is a charcoal.

D. Q. 22. Please state your opinion as to the possibility of these soluble dyes that you have read into the record, [fol. 170] being absorbed by the skin, if these dyes are used for coloring cosmetics or toilet preparations.

A. I don't believe they would be absorbed by the skin, because that has always been one of the research questions of getting a vital dye of the epidermis through an external application.

D. Q. 23. Has that research succeeded at the present time?

A. No.

D. Q. 24. A great many physicians and research men have been working on this problem for a number of years?

A. Oh, yes. I have been working on that myself for a long time. I said, through external application. I mean by that that we have been unable to get a vital dye of the epidermis through an external application, or an internal, for that matter.

D. Q. 25. How about inert pigments, if they were used for producing some of the color effect of a cosmetic, could an inert pigment be absorbed by the skin?

A. I don't think so. In the record of qualifications, there is a new qualification which has just come out. It is so new that I forgot it. And that is, that I have just received a certificate as Dermatologist, certified by the National Board. This is the first time that a certificate has been issued. If you want that in, you can have that in. It is accepted as a specialty by the Academy of Medicine.

D. Q. 26. You have given us some general testimony as to the effect of cosmetics upon the human being?

A. Yes.

D. Q. 27. Does this testimony cover all cosmetics, including any which have not been specifically mentioned?

A. Well, I'd rather qualify that.

D. Q. 28. Well, I will qualify it in this way: Is there a general classification of cosmetics so as to place in one category cosmetics which do not exert a chemical action, [fol. 171] and to place in another category cosmetics which do exert a chemical action?

A. That is a very good way of classifying them.

D. Q. 29. Referring to face powders, lipsticks, rouges, face creams, lotions, would you classify them as being cosmetics which exert a chemical action, or would you classify them as being cosmetics which do not exert a chemical action?

A. I think you will have to qualify your lotions. Do you mean lotions, liquid face powder?

D. Q. 30. I mean alcoholic perfume, alcoholic lotions, such as those used by men after shaving, for example? Give your answer according to what the facts are, and disregarding the form of my question.

A. Yes. I think they may be classified as cosmetics, which, due to their inert materials which they contain, exert no chemical action on the skin.

D. Q. 31. Outside of dyes, bleaching creams, and depilatories, do you know of any other cosmetics which you consider exert a chemical action on the skin?

A. Yes, the so-called acne creams. They certainly do. And certain face powders, containing sulphur.

D. Q. 32. Now, taking the materials or cosmetics which you say exert no chemical action on the skin, would you generally classify them as being harmful or harmless?

A. I would say harmless.

D. Q. 33. Would you classify an acne cream as being a cosmetic or a medicinal product?

A. A medicinal product.

D. Q. 34. For how many years have you had actual clinical and other experience in observing the effect of cosmetics on the skin, or upon the human being in general?

A. Almost ten years.

Mr. Blum: Direct examination closed.

[fol. 172] Cross-examination.

By Mr. Chapman:

X Q. 35. Do you come in contact with the practices in the beauty parlors and the hair-dressing shops?

A. Yes, as my patients come to me.

X Q. 36. And whether or not this acne cream is ordinarily used in the beauty parlors?

A. What is that?

X Q. 37. Whether or not this acne cream——

A. Yes.

X Q. 38. Is ordinarily used in beauty parlors.

A. Oh, they use them all right.

X Q. 39. A while ago you spoke of something that must not be combined with fats. What was that, Doctor?

A. One of the pigments does not dissolve very well into fats. I think it is a question of physical properties more than anything else. It says, it refers to (referring to book)—just a minute. It refers to this betula alba, which is a red coloring matter, and it says here (reading):

"It is used for all alcoholic cosmetic preparations, such as contain glycerine. Aniline dyes are the best coloring matters. On the other hand, they are unsuitable for cosmetic articles that contain fats, whether animal or vegetable; that is immaterial."

X Q. 40. It does not have any harmful effect?

A. No, it is a question of physical properties.

X Q. 41. Do you know whether or not, Doctor, barium lake—is it used in lipsticks?

A. I do not know.

X Q. 42. You do not know?

A. No.

X Q. 43. Are you acquainted with the qualities of barium lake?

A. Not at all.

X Q. 44. Are you acquainted with the qualities of para-nitro-aniline?

A. No.

X Q. 45. And if they were present in a lipstick, you would not know whether they were harmful?

A. I haven't the slightest idea of their action.

[fol. 173] X Q. 46. Is barium in a dye, poisonous?

A. It might be.

X Q. 47. And in a lipstick?

A. I imagine it would be. It is a very active substance. Let me qualify that. Barium, of course, is given internally, and, in huge quantities given, it is absolutely harmless, but I could conceive that it might possibly be.

X Q. 48. That is true of a great many poisons, Doctor, is it not?

A. Yes.

X Q. 49. Some systems can resist, and others cannot?

A. Yes, but we give barium in tremendous quantities, for example as in X-rays, much more than you would get in lipsticks.

X Q. 50. But occasionally you find some supersensitive person?

A. You might; it is conceivable.

X Q. 51. Would you say that a face powder containing lead carbonate was harmful or harmless?

A. I wouldn't recommend it.

X Q. 52. Because you consider it might be harmful?

A. Yes.

X Q. 53. Would the harmfulness of barium depend upon the compound of barium?

A. It might, depending upon the solubility.

X Q. 54. Have you done any work, Doctor, in connection with any New York City ordinance concerning cosmetics?

A. In what manner?

X Q. 55. Cosmetic preparations?

A. No.

X Q. 56. You are not familiar with any such ordinance?

A. No, but I know that heavy materials are——

X Q. 57. What is that?

A. Well, mercury, because that is common knowledge. Of course, the question of paraffin comes up in our work all the time.

By Mr. Chapman: That is all.

[fol. 174] Redirect examination.

By Mr. Blum:

R. D. Q. 58. Just one question: Some reference has been made to aniline derivatives. Are there aniline derivatives

which are absolutely harmless and which are used as coloring materials for food products?

A. I think there are.

By Mr. Blum: I show counsel a note of Food Inspection Decision 117, and others, by the United States Department of Agriculture, in administering the Federal Pure Food and Drug Act, and I will ask if he will concede that certain aniline dyes, including erythrosine, are approved of, as being suitable for use in food colors.

By Mr. Chapman: Yes.

By Mr. Blum:

R. D. Q. 59. How about amines, do they occur naturally in food products?

A. They might.

R. D. Q. 60. How about the ordinary herring. Does that contain some natural amines?

A. I believe it does. Of course, amine is just a general chemical term for a group of chemical substances.

R. D. Q. 61. Well, it is a fact that there are a number of aniline substances which are absolutely harmless to the human system?

A. Yes.

R. D. Q. 62. You mentioned, I believe—para-nitro-aniline?

A. Yes.

R. D. Q. 63. Is that an example of one amine or aniline derivative which may be harmful, if used in a hair dye?

A. It is one of the group which may be used, which may be harmful.

R. D. Q. 64. But that relates particularly to hair dyes?

A. Yes.

[fols. 175-176] By Mr. Blum: Any more questions of this witness?

By Mr. Chapman: No, sir.

By Mr. Blum:

R. D. Q. 65. In referring to the face powders, I believe you mentioned one or two substances, such as rice starch, which might have some effect on a supersensitive person?

A. Yes.

R. D. Q. 66. I mean a hypersensitive person?

A. A hypersensitive person.

R. D. Q. 67. Yes. What percentage would those materials have to have, to be present in the face powder, before they could exert any effect even upon a hypersensitive person?

A. Percentage has nothing to do with it, because as you recall, the doctor said that if you have it in the ratio of one in one hundred thousand, you cannot test it. We can, however, test it allergically. For instance, the patient may get it in the ratio of one to one million, and we know it is there; it is a biologic method of testing.

(Deposition closed; signature waived.)

[fol. 177] This testimony was taken with reference to Chap. 278 of the Public Laws of Maine 1933, which was repealed by the statute in issue. Said testimony has been included because of its pertinence to the issue in the instant case.

[fol. 178] Henry C. Fuller, a witness called in behalf of the plaintiffs, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Blum:

Q. Will you please state your full name, age, residence, and occupation?

A. Henry C. Fuller; Washington, D. C.; Consulting Chemist and Toxicologist; and I am over forty-five years old, and have been in practice for around thirty years.

Q. Please state your technical training and experience in the field of chemistry, of cosmetics, and in toxicology?

A. Well, my training as a student was obtained at the Worcester Polytechnic Institute, Worcester, Massachusetts, where I resided, from which I graduated in 1901. I [fol. 179] was for five years with the Department of Agriculture, working with Dr. Wiley and his associates under the Food and Drugs Act, and as far back as 1907 we began to examine cosmetics, which were then quite extensively, partly, medicinal products. Following my association with the Department, I went into private practice with the

Institute of Industrial Research in Washington, and, Dr. Wiley leaving the government about that time, I collaborated with him in the production of his book called "One Thousand and One Tests," and which goes into the action and composition in a general way of cosmetics along with other articles, examining for that work some two or three thousand different preparations. I have been in private practice in my own name since 1921 and have done considerable work for different toilet-goods manufacturers, so that, well, I think it is fair to state that in that period I have examined at least 20,000 different samples, or they have been analyzed under my direction and I have passed on the composition. I have written two textbooks on analytical work as it relates to drug products, and these are used to some extent in analyzing these cosmetics, one called "The Qualitative Analysis of Medicinal Preparations" and the other "The Chemistry and Analysis of Drugs and Medicines," both published by John Wiley and used by the government laboratories and by some of the state laboratories as their textbooks.

Q. Are you acquainted with the practical methods used in manufacturing cosmetics of various kinds?

A. I have had some contact with them through my visits to factories and general knowledge as to how cosmetics are mixed—have to be for the different ingredients that are used in them.

[fol. 180] Q. Taking up perfumes, for example, and more particularly perfumed face powder, please state what you know as to the possibility of securing uniformity of composition in the same batch of face powder in the same mixing appliance?

A. It is not easy to get absolute uniformity in a mixture of that sort, because of the composition of the ingredients. You take a face powder which contains probably titanium dioxide, zinc oxide, zinc stearate, talcum, maybe magnesium oxide, possibly calcium carbonate, and a perfume, and it is very difficult to get those percentages always uniform in two subsequent batches. For example, you make a batch today and it may contain 10 per cent of talcum, and possibly tomorrow, when you make it up in your mixing machine, it may run 9.8 or 10.2, and the same with all the others. Of course, with the perfume that amount is rather small. In any face powder, variations either of one-tenth

or two-tenths of a per cent may seem rather large. In the total actual percentage you take one-tenth of a per cent of that, and it is not very much.

Q. Disregarding the particular percentage of the perfume, is it possible to make successive batches of a face powder or other perfumed cosmetic and have each batch contain exactly the same percentage of perfume?

A. Well, I never analyzed any of them for the perfumes after they were completed, but from my general summary of the situation, I should say no, not exactly the same.

Q. Are you acquainted with the requirements of the medical profession in the United States Pharmacopoeia about the exactness in manufacturing tablets for medicinal purposes?

A. The Pharmacopoeia does not go into the manufacture of tablets. It describes, however, the purity rubric for the substance that goes into the tablets. The Depart- [fol. 181] ment of Agriculture fixes the tolerance of those things after they are compared.

Q. Please compare these tolerances as used by the medical profession with the one-tenth of one per cent tolerance which is described in the Regulations?

A. In the Pharmacopoeia the pure rubrics, as we call it, that is, the standard for the different drugs which are used medicinally, are never—I say never—I can't think right offhand of anything that goes up to 100 per cent or to 99.9 per cent. The variation is often five per cent from the 100 per cent purity. That refers to the chemicals themselves. Now in the tablets—for example, say we have a morphine table that contains one-twenty-fifth of a grain or one-tenth of a grain, something of that sort; if it is found on analysis that there is a slight variation in that, and that variation may be ten per cent in one-tenth of a grain, why, I think that tolerance is very often allowed, and in some cases I have known—I can't recall the exact drug now—where it has been thirty per cent that has been allowed; that is, fifteen per cent one way and fifteen per cent the other, making a total range of thirty per cent. As I say, I can't recall the particular ingredient, although I was concerned with it at the time.

Q. Taking soap, for example, let's assume, without passing upon this point, that soap is a cosmetic. If a batch of

soap is being boiled in a kettle, does that batch have the same composition in all parts of the kettle?

A. Well, probably not, and when it is poured out to solidify there is likely to be a variation in the amount of moisture in different parts of the pour, which would, of course, make the actual soap have more or less either sodium or potassium stearate, whichever the same is made with.

Q. Would such variation constitute more than one-tenth [fol. 182] of one per cent of the final product?

A. It would probably be a great deal more than one-tenth of one per cent.

Q. Suppose that batch of perfumed cosmetic is being made up by mixing the non-perfume ingredients with a perfumery. Is it possible by ordinary mixing machinery, as commonly used, to get absolute uniformity in the proportion of perfume throughout the batch?

A. Not what we call an absolute 100 per cent mix; that is, in successive batches. I suppose that is what you mean.

Q. Now, from your experience as a toxicologist, does a variation of one-tenth of one per cent in an ingredient of any cosmetic have any relation whatever to the health of the individual using it?

A. No.

Q. How about the public health? Is that affected in any manner by the use of a cosmetic?

A. Any cosmetic?

Q. Is there any cosmetic which can produce a contagious disease or anything which will affect the public health?

Judge Wilson: I don't think I quite understand your question now.

Mr. Blum: I don't believe he does. I will withdraw the question.

By Mr. Blum:

Is there any such thing as a cosmetic whose use will render the person using the same dangerous to the health of other people?

A. No.

Q. What can you say as to the maintenance of trade secrets in the composition of their perfumes by the houses who are engaged in the perfumery business in this country?

A. It has been my experience that they are very guarded [fol. 183] and refuse to give up the list of ingredients and the proportional amounts.

Q. Take a compound of bouquet. About how many ingredients would ordinarily be present in a compound perfume?

A. They usually run from ten to fifty.

Q. Would it be possible without prohibitive expense to chemically analyze any compound perfume in order to ascertain its ingredients?

A. It would be almost impossible to do it.

Q. How many gallons of perfume would you need for such an analysis?

A. Well, I would want myself a gallon of the oil. That is the mixed perfume that goes into the alcohol. Or I should probably want about ten gallons of the finished perfume. And then I wouldn't want to say that I could analyze it.

Q. Is there any such thing as a practice amongst the chemists, like yourself, of analyzing a perfume in order to find out what goes into it and make it possible to reconstruct a perfume?

A. No. The perfumery business, the duplicating and development of perfumes, is an entirely different matter. That is a specialist's job.

Q. Take these specialists; are they chemists or what are they?

A. They don't need to be chemists. I doubt if they are as a rule. They go by the name of perfumers. The formulation of perfume is an art. It isn't an exact science like chemistry, where you analyze and get results out which you can interpret in figures. It is a mixing of a little of this and a little of that until they get something that is what they want.

Q. Would you say that the art of the perfumer was similar to tea-tasting or coffee-tasting, something which is de- [fol. 184] pendent upon especially gifted persons?

A. It is analogous to that, from my knowledge of both tea-tasting and coffee-tasting. If I may give an example, the greatest expert in that line was a man named Harris, who could tell by the taste the brand of practically any coffee that was ever brought to his notice. I myself was skeptical of it, and so was Dr. Wiley until he took ten different brands of coffee, made them up into decoctions, and pre-

sented them to him unlabeled, and he named every one of them, whereupon he was convinced. It is the same way with tea-tasting. There are very few good tea-tasters, but there are some. For example, George Mitchell, who probably knows more about tea than any other man in the world, can tell almost instantly what the tea is by simply a taste of it. But it is an art in itself. It is not anything you can define as a profession.

Q. Taking up Section 4 of the Regulations, if you were informed of a complete statement of the principal ingredients of a cosmetic, the principal ingredients being defined as anything which constituted more than one-tenth of one per cent. of the final product, would that information enable you as a skilled chemist to reconstruct the original cosmetic?

Judge Peters: You mean Section 2, don't you?

Mr. Blum: No, sir. Section 4, I believe it is, of the Regulations. I beg your pardon; I mean Section 4 of the Regulations. If I said "of the statute," then I misquoted.

The Witness: Is it Section (a) you are referring to?

Mr. Blum: Section 4 (a), please.

Judge Wilson: You might repeat the question.

Mr. Blum: Yes, sir.

[fol. 185] By Mr. Blum:

Q. I call your attention to Section 4 (a) of the Regulations. Have you found that, Doctor?

A. Yes.

Q. Now, if you were provided with the information which is specified in Section 4 (a), namely, a complete statement of the principal ingredients of the preparation, would that enable you to reconstruct the original cosmetic?

A. I think I could come pretty near to doing it.

Q. Now, you made some statement about the difficulty or the impossibility of chemically analyzing perfumes. What is the situation with regard to cosmetics, such as lip-sticks or the like? Is it an easy or a very difficult thing to chemically analyze these preparations? A. Well, it is a difficult piece of work and it is doubtful if one could get on analysis the exact composition. However, you could get enough information probably to make something that would closely duplicate it. May I give an example?

Q. Yes, if you wish.

A. You take a lip-stick. There are in that usually three or four, sometimes more than that, different fats and oils. We have the waxes, spermaceti, cerain, beeswax, for softening agents; petrolatum for smoothness; sometimes lanolin for the same purpose; usually oil, like olive oil or castor oil; then cocoa butter which melts at the temperature of the human body. In that mixture they might have used a hydrogenated fat for some purpose, like, of course, cresco. That is an example of hydrogenated oil or fat that is being used. That type of product is now being used in creams. It would be extremely difficult to actually identify some of those products and be sure that they were there, but you could take those articles that I have named and mix them together and get something that would have just about the [fol. 186] same melting point and would probably answer the purpose. The same way with the dyes. There you have a little more difficulty, because you have not a mixture there usually with a lake with possibly a soluble color in small amount and may be one or two other compositions. There may be two or three different lakes there. It is an awfully hard piece of work to actually separate those things and identify and determine their quantities. It might take a man six months to work out his process before he was able to analyze his lip-stick intelligibly.

Q. However, if you were provided with the information provided in Section 4 (a), namely, a complete statement of the principal ingredients, the working samples of each principal ingredient, would that trade secret remain a trade secret any longer to a skilled chemist?

A. No.

Q. From the viewpoint of the health of the individual using the cosmetic, or the public health, is it necessary for the Bureau of Health to have such a complete statement as the ingredients of a cosmetic?

A. In my opinion, no.

Q. I call your attention to Section 4 (b), 4 (c), and 4 (d) of the Regulations, also 4 (e), in which certain specified substances are listed. Are there any substances other than these specifically listed which could have any injurious effect and which are used in cosmestics? A. Yes, and I am not prepared to agree that one of these things is injurious in the percentage that it is given. That is the

caustic alkali. I don't think that is of any moment up to one and one-half or two per cent. As a matter of fact, in my own experience, from tests made under my observation and with my collaboration, I have found two per cent. was, even, beneficial.

Q. When you said "Yes," do you mean 4 (b) to 4 (e), [fol. 187] inclusive list all the substances which by any possibility might be considered as injurious ingredients of cosmetics? Is that what you mean?

A. I mean they have not named them all.

Q. Now coming back to Section 1 of the Regulations, is it a well-known practice in the face-powder industry to make up the same face powder, using the same coloring material, but using this coloring material in different proportions, so as to make different shades of the same general color?

A. Yes.

Q. Now does lowering the percentage of a coloring ingredient have anything to do with the harmfulness or harmlessness of the product?

A. No.

Q. Does the diminishing of the percentage of a perfume in a powder or other cosmetic have anything to do with the harmfulness or harmlessness of a product?

A. No.

Mr. Blum: Direct examination closed.

Cross-examination.

By Mr. Chapman:

Q. Doctor, did I understand you to say that a variation of one-tenth of one per cent. of an ingredient could not affect the public health?

A. I don't think so, in cosmetics, no.

Q. Your answer is that you do not think so?

A. I think not, in my opinion.

Q. Assuming that arsenic were used in a cosmetic, Doctor, might not a variation of one-tenth of one per cent. have a harmful effect upon the health?

A. I don't think arsenic should be tolerated in cosmetics anyway.

Q. Do you know whether it is or not?

A. I have very seldom, if ever, found it in recent years.

Q. Assuming that arsenic is used in cosmetics, is your answer the same as given to Mr. Blum?

[fol. 188] A. My answer to that would be that it would probably be deleterious in the beginning and one-tenth of one per cent. one way or the other wouldn't make it much worse.

Q. If you had one-tenth of one per cent. and doubled that amount, it would have some effect on the health, wouldn't it, Doctor?

A. I wouldn't be surprised; yes, sir.

Q. Did you state, Doctor, that dyes are harmless?

A. I didn't intend to, Mr. Chapman. You may have misunderstood me.

Q. I don't know that you did. You should not have stated it, if you did?

A. Not all of them. Of course there are some dyes which are relatively harmless and which are usually used in these cosmetics, especially lip-sticks and things of that sort. There are plenty of harmful dyes.

Q. What is that?

A. I will admit there are dyes that are harmful.

Q. How many are there, do you know?

A. That would be a pretty big order.

Q. How many organic dyes?

A. Thousands of them, but they are not all, of course, deleterious.

Q. Do you know how many—what the proportion is?

A. I wouldn't want to state, no.

Q. Doctor, how many aniline derivative dyes are permitted by the Department of Agriculture for food products?

A. You embarrass me in answering that question because I can't give you the chemical composition of the permitted dyes. I think some of them are gallic-acid dyes, that is, they are not aniline dyes at all; but just which ones they are I can't tell you offhand. I am very sorry that I have to plead ignorance.

Mr. Chapman: Nothing further, your Honor.

[fol. 189] Redirect examination.

By Mr. Blum:

Q. During the last five or ten years have you ever known of the use of arsenic in any face powder, lip-stick, cream or cosmetic of that type?

A. I can't recall any at this moment. I didn't know that it was used.

Q. Well, as a matter of fact, what do you know about the use of arsenic in the cosmetic industry during the last ten years? Do you know anything about it?

A. It has never been used in anything that has come under my close observation, that is, in anything that I have tested, or any of the people that I have worked for—they have never used any arsenic.

Q. Take the great bulk of cosmetic sales: is it correct to say they consist of creams, face powders, lip-sticks, and rouges?

A. That makes up a pretty good percentage of them. Of course there are other types besides them.

Q. When I say "creams" I include all kinds of creams. Do any of these materials have any chemical effect upon the skin?

Judge Wilson: What materials are you referring to now?

By Mr. Blum:

Q. We will take the lip-sticks, rouges, face creams, and the powders. Do these materials, which make up the great bulk of the cosmetic industry, have any chemical effect upon the skin, or do they merely have a covering effect upon the skin?

A. I think, with the ingredients that now compose them, they are simply covering agents; they have no chemical action.

Judge Wilson: I didn't hear.

[fol. 190] A. (Continuing.) With the present type of ingredients that are used in cosmetics of that brand that he has mentioned, that is, the creams, face powders, and the lip-sticks, and the rouges, there is no actual chemical effect on the skin, that is, on the animal economy.

By Judge Wilson:

Q. You mean "effect on the skin"—it has no chemical effect on the skin?

A. If I may give an example, there used to be a cosmetic called freckle cream, and there may be some on the market, though I think their use has diminished considerably, that

contained bichloride of mercury. Those mercurial salts of that nature did have an effect on the skin; they actually dissolved it and removed the freckles by removing the epidermis, and were dangerous, not only from the local effect, but from the possible systemic effect from the mercury. I call that a chemical effect, differing from lip-stick which simply covers the part with which it is brought in contact and is not absorbed by the skin and has no effect on it. It is very difficult to make any chemical which will be absorbed, from a mixture of fats such as I have described, that compose lip-sticks. That I know from a great deal of personal experience.

By Mr. Blum:

Q. Is it safe to say that at least 95 per cent. of the sales of the cosmetic industry in this country are represented by these inert materials which have no effect of any kind upon the skin except to cover it?

A. I don't know as I am qualified to give those statistics. I would rather not.

Mr. Blum: Redirect closed.

[fol. 191] Recross-examination.

By Mr. Chapman:

Q. Doctor, have you had occasion to analyze any acne lotions?

A. I have analyzed acne preparations, but not a great many of them.

Q. In the acne preparations which you analyzed did you find any harmful ingredients?

A. Well, as I recall those products, they may contain carbolic acid, zinc salts, possibly salicylate, salicylic acid.

Judge Wilson: I don't think we hear what kind of lotion you are talking about.

Mr. Chapman: Acne, may it please the Court.

Judge Wilson: Is it a skin lotion?

Mr. Chapman: I understand it is, your Honor.

A. (Continuing.) I would call acne lotion, myself, a medicine, I wouldn't call it a cosmetic. But I can conceive where by the careless use or over-use of a mixture such as I have described—I believe those ingredients are used in those mixtures, something of that type,—you might effect

a dermatitis of the skin and perhaps cause some discomfort to the user. But, as I say, I would consider an acne mixture a medicine and not a cosmetic.

Q. Do you know whether or not, Doctor, they are commonly used in beauty shops?

A. That I don't know. I couldn't say.

By Judge Wilson:

Q. What do you mean by a medicine, Doctor? I don't understand.

A. A remedial agent. Acne is in my opinion a pathological condition of the system, that is, those little bumps and blackheads and things that people seem to have great difficulty in removing. It is usually caused, of course, by some organic condition, in my opinion. I am not a physician; I [fol. 192] really should not qualify thus here, but it is treated by mixtures, these lotions which the Attorney-General has asked me about and which contain one or more of the substances I have mentioned. Carbolic acid being one. The amount is small. Maybe one per cent. Salicylic acid. A zinc salt. Maybe zinc chloride. Well, to me those are more remedial agents than they are just cleansing or beautifying, as those act perhaps remedially.

By Judge Peters:

Q. Do they get inside the system in any way? Applied to the skin, aren't they?

A. They are applied to the skin.

Q. Do they penetrate it and get into the system?

A. If you got an abrasion—of course those are usually abraded surfaces—it is not unlikely that there would be access to the blood stream.

Q. Is that why you call it a possible medicine?

A. No, it is not because it has access to that, but because it is to relieve or eliminate the condition, this pathological condition or discomfort, which is manifested by this eruption known as acne. In that way it becomes, in my opinion, more of a remedial agent than perhaps a cosmetic.

By Judge Wilson:

Q. Would it affect any of the organic troubles?

A. If not local, you would have to treat that by other means, and I prefer not to qualify in that field.

By Mr. Chapman:

Q. Would you consider cuticle remover a cosmetic?

A. Yes.

[fol. 193] Q. Assuming that one contained three per cent. of potassium hydroxide, would you consider that was a harmful amount?

A. I have never had any experience with anything over two per cent. I am quite satisfied that two per cent. is not harmful. On the other hand, I found that it was beneficial, in that it acted as an antiseptic to the under portion of the cuticle. Under my supervision we have made tests to determine that point, because complaints have been registered that those products have caused infection and to prove that it was not so, that is, to ascertain whether it could happen, tests were made, and it was found that it was beneficial, in that it not only softened the cuticle without harming the person at all, but it killed any dirt, any infection, any organisms—they might not be infectious organisms, but any organisms that might be in the fold there of the cuticle, and, if it would kill them, it would kill pathogenic organisms, the streptococcus and the staphylococcus, as well.

Q. How long would this be active after applying once so as to kill these different germs?

A. In those tests were usually allow it to remain about five minutes on there before we make the smears to get the cultures, five or ten minutes.

Q. Assuming it contained six per cent. of phenol, would you consider that harmful or not?

A. May I ask in what menstruum? Phenol up to 25 per cent. is perfectly harmless when placed on the skin. Phenol —carbolic acid I am speaking of now—in aqueous solution, if it is six per cent., I would want to handle with gloves on.

Q. Did you have any occasion, Doctor,—I call you Doctor correctly, do I not?

A. That is all right.

Q. Do you have any occasion to analyze any mascara?

A. No, I never have.

[fol. 194] Q. So you have no knowledge concerning that particular cosmetic?

A. I am not familiar with it.

Q. You would consider mascara a cosmetic, wouldn't you, Doctor? A. I think it is.

Q. Did you have any occasion to analyze any rouges, Doctor?

A. Well, I have examined a great many of them at one time, and another, powder rouges, paste rouges, even liquid rouges. That was one of the first ones we ever analyzed. I recall back twenty years ago liquid rouge was one of the first things we ever tested.

Q. Did you ever discover that any of those rouges contained lead?

A. No.

Q. You never happened to run across it?

A. I never happened to run across it; no, sir.

Q. Assuming that a rouge did contain lead, would you not consider that possibly harmful, Doctor?

A. It would depend a little bit on the form in which the lead occurred. That is the salt I assume you mean. You don't mean metallic lead?

Q. Certainly not.

A. The absorption of lead by the system is something that has been handed down from year to year by the toxicologists as a potential danger, but within the last year I ran quite a series of experiments, in collaboration with my associate in Washington, with lead salts in certain preperations, with the discovery that there was no absorption. Now that involved lead chloride. Well, with that particular salt lead lactate the tests were rather conclusive, because we examined the blood and the urine and watched for wrist-drop and other characteristics of lead poisoning, finding that nothing happened. I think the difficulty with lead is, where people have been poisoned, they have gotten it off their fingers by leaving it on, not cleaning themselves, and [fol. 195] then sucking them. I really think local application of lead salts is not particularly dangerous. On the other hand, I do not want to hold any brief for lead salts in cosmetics. I am just telling you my experience. I would rather not use them. I would rather not see them used, to be perfectly honest with you.

Redirect examination.

By Mr. Blum:

Q. Just one question. You have been asked about certain substances. During the last twenty years, what can you say

as to the general practice in the cosmetic industry? Has it been to put out harmless preparations or harmful preparations?

A. The trend has been to eliminate as far as possible anything that might be harmful. Whereas, possibly, when I began my experiments, my career you might say, five per cent. of what you would find, you would analyze, that is, I mean, of the total bulk of cosmetics, might be considered harmful, I think now, of the total bulk of cosmetics sold in the United States I doubt if more than one or two per cent. you could call harmful, and may be that is exaggerated, but I think the percentage is rather small.

By Judge Peters:

Q. In what ways are those harmful, and what are they?

A. The products which are listed in this bill, this act, are the ones which are usually considered the harmful ones. Take mercury, for example There are freckle creams that contain mercury compounds. I have already discussed that.

Q. What do they do to the system? In what way are they harmful?

A. In removing the epidermis and laying the skin open to infection If a person scratches it, it is a very easy [fol. 196] way to get blood poisoning, by simply scratching a thing like that, with the dirt that accumulates under the fingernails. And, well, irritation, general irritation of the skin.

Q. It lays the skin open to other attacks?

A. Yes, sir, and there may be some absorption too into the blood stream. Mercury compounds do get in very easily. Cadmium. I don't know of any cadmium preparations used in cosmetics. Cobalt. Copper. Lead salts I have already discussed. I don't consider lead very much of a danger in cosmetics. Silver is used in hair dyes to some extent. I don't know whether that is harmful or not. I presume if it got into the system, it might produce the blackening that occurs from taking silver nitrate. You may have seen people who have been treated with silver nitrate for some purpose or other that became permanently black. It is rather an unusual thing, but it does happen. Barium compounds are mentioned here. They are used in depilatories. While I have had a good deal of experience with depilatories, I can't say I have seen or heard of a case of anybody being

adversely affected by the administration of a barium-sulphide depilatory under the conditions that it is supposed to be used. There may be cases where it has happened, but I don't know of them, and I have examined a great many preparations and been in contact with them through my association with firms for a considerable time. Thallium, yes, a substance which should not be permitted in cosmetics.

Q. What does that do?

A. Thallium acetate.

Q. What does that thallium do to the system?

A. The effects are very baneful. I know that people who use it lose all of their hair and their skin, and even their flesh becomes affected. We have a dermatologist here who [fol. 197] perhaps can give you symptoms better than I can, but I have seen, there have come under my observation, cases of people who have been adversely affected from depilatory containing thallium acetate, and the skin and the flesh showed a most unpleasant look. If I were writing this law, I would forbid it entirely. The aniline and amine dyes, used in hair tonics, are well known, and in the early days, when they began to use paraphenylendiamine, which is rather a complex dye, to produce a deep shade in the hair, there were undoubtedly reported cases of difficulty, which may have been due partly to the lack of knowledge in their application and the carelessness with which the operators applied them, because at the present day there is a great deal of that being applied, not in the form of paraphenylendiamine so much, but the toluidine compound, which is toxic. I don't hold any brief for these products in here; I don't think they are perhaps as harmful as they have been reported, and I don't know of anybody who manufactures them, but I simply have given my honest opinion.

Mr. Blum: I might say to the Court that we represent no manufacturer and no preparation which is within the specific provisions of these Regulations 4 (b), 4 (c), 4 (d), and 4 (e), so that question does not come before your Honors in any way.

A. (Continuing.) Some of these other items which are mentioned here—I don't know of their being used in cosmetics at all. Hydrochloric acid. Sulphuric acid. Nitric acid. Carbolic acid (known as phenol)—yes, that is in these acne preparations I have just discussed. Oxalic acid and

ammonia uncombined. I don't think any of those are used [fol. 198] in cosmetics. I don't know of their being used.

Mr. Blum: Unless your Honors wish to ask the witness any more questions, I am through with him.

Mr. Chapman: My brother referred simply to Liggett and Bourjois as the firms represented by him.

Mr. Blum: That is correct. We also represent the American Association of Toilet Goods Manufacturers. There is no question that we are authorized by them to bring in these tests cases. With 96 members.

Mr. Chapman: Do you represent Barbara Gould in any way?

Mr. Blum: I don't know. The Association has 96 of the large concerns. My partner tells me Barbara Gould is not a member of the Association.

Mr. Chapman: You don't represent the Barbara Gould firm in any way?

Mr. Blum: No; we have never had anything to do with it.

Recross-examination.

By Mr. Chapman:

Q. With what firms have you been connected, Doctor?

A. I have been connected with Parke-Davis & Company of Detroit, Michigan; done work for the Carbide & Carbon Chemical Corporation, the L. D. Caulk, Milford, Delaware, Northam Warren Corporation, New York, and other firms. I have done work for Smith, Klein & French in Philadelphia, Dr. D. Jayne & Son.

Q. Do those firms you have enumerated put out cosmetics?

A. Well, they either put out cosmetics or some similar [fol. 199] product, or else ingredients which go into cosmetics.

Q. You do not know?

A. I know; yes, I know that they put out those things.

Q. Do they put out cosmetics?

A. Well, Smith, Klein & French, for example, puts out face creams and probably shampoos and things of that sort. And the Union Carbide Company sell some of the solvents, like triethylamine, which goes into cosmetics. I don't mean that is their entire business, but they do put out those sorts of products.

Q. Triethylamine you mentioned?

A. Yes, sir.

Q. Is that a harmful ingredient, or harmless?

A. Harmless.

Q. Perfectly harmless?

A. Yes. It is used in a very small quantity anyway, and it acts with stearic acid in cream to form what we call a soapy mixture. It takes the place of caustic alkali or ammonia in the manufacture of cream, and any alkaline properties it might have had are neutralized by the stearic acid.

Q. Supposing it was used in certain waving preparations without any ingredient to neutralize it, might it not have a harmful effect?

A. Waving solutions, did you say?

Q. Hair-waving solutions, yes.

A. I don't know. I would rather not state. I don't think it would, because I made some tests with that on animals several years ago and, while I can't tell you what the percentages were now, I don't think in the ordinary mixture,—that is what we call five or ten per cent., in with water, which is about what we use for waving solution—that it is harmful.

Q. Are you familiar with a toilet preparation known as Vapon?

A. No, I am not.

[fol. 200] J. HARPER BLAISDELL, a witness called in behalf of the plaintiffs, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Blum:

Q. Will you please state your full name, age, residence, and occupation?

A. J. Harper Blaisdell; age 48; 5 Bay State Road, Boston. My occupation is physician.

Q. Please state your experience and training as a physician, with particular reference to your specialization as a dermatologist?

A. I graduated from the Harvard Medical School in 1911, and for the next six months I was the dermatological

house officer in the skin department of the Massachusetts General Hospital, and from 1912 to 1928 I was in continuous service with the skin department of that hospital in various capacities. For six years I was the head of the skin department of the Boston Dispensary. For twelve years I taught dermatology and syphilis in the Harvard Medical School. I am a member of the Massachusetts Medical Society, the American Medical Association, a charter member and Secretary of the New England Dermatological Association, a member of the American Dermatological Association, and a member of the recently created Board of Specialists of the country.

Q. How many years' experience have you had in observing the effects of cosmetics upon the human skin?

A. Twenty-three years.

Q. Does that also include the effect of perfumes upon the human skin?

A. Yes, sir.

Q. Now please state to the Court what you have learned in your experience of twenty-three years as to the effect of the cosmetics made and sold in this country upon the human skin?

A. The great majority of cosmetics are harmless to the [fol. 201] general public. When reaction does take place, it is the result of personal idiosyncrasy to that particular product. The number of preparations that are generally harmful to the public are very, very small.

Q. In percentages based upon the total population, what percentage of people do you estimate have some personal idiosyncrasy which makes them respond unfavorably to cosmetics in general?

A. It is simply an estimate, because there are no figures on that, but it is my opinion that less than one person in a thousand would react to the various cosmetics.

By Judge Wilson:

Q. React harmfully, you mean?

A. React harmfully, yes.

By Mr. Blum:

Q. Are there other materials in common use, outside of the field of cosmetics, to which certain people react harmfully in about the same percentage? If so, please mention them?

A. The reaction of people to cosmetics is analogous to the reaction of people to foods, and the reaction is much the same. Both essentially are biochemic reactions. A reaction, for instance, of a person to cucumbers, giving him indigestion, or strawberries, giving him urticaria, is analogous to that, and so far as I know the percentage is about the same.

Q. How about the use of furs by women? Please compare that insofar as any injury is produced by the use of cosmetics?

A. Compared to the total number of the fur pieces worn by the population, the number of reactions to those furs is very tiny. I see perhaps two or three cases of that sort in a year.

[fol. 202] By Judge Wilson:

Q. In those cases would the furs be just the same as those worn by other people who were not affected at all, or was it due to some peculiarity of that fur?

A. Due to the reaction of the individual to that fur or the dye process of that fur.

Q. Not because that fur was any different from other furs of the same character?

A. No, sir.

By Mr. Blum:

Q. In those cases where you have noticed dermatitis resulting from the use of a cosmetic or perfume, has that been a serious condition or has it been merely a local irritation which was easily cured?

A. The great majority of the cases are local irritations.

Q. How about theatrical people who use cosmetics all the time? Are they known as being susceptible to any particular disease or disorder because of their use of cosmetics in large quantities?

A. As a matter of fact, it is very unusual to see theatrical people with irritations of the skin from the use of cosmetics, and I suppose that they use them in quantity more than, a great deal more than, the average person.

Mr. Blum: Direct examination closed.

Cross-examination.

By Mr. Chapman:

Q. Isn't it quite likely, Doctor, that theatrical people may get immune to harmful preparations from quite constant use of them?

A. No, sir. As a matter of fact, the reverse would be true.

Q. If a cosmetic were harmful, instead of a person be-
[fol. 203] coming immune, it would be just the opposite?

A. Yes, sir.

Q. You spoke about people being sensitive to furs. Just what is it about the fur that affects some particular people?

A. It may be a reaction to the animal fur itself, or it may be a reaction to the dye process through which the fur is put.

Q. You say it may be one or the other. Do you know which it is, or do you mean that in one particular instance it may be the fur itself and in the other instance it may be the dye which has treated the fur? Is that what you mean?

A. Yes.

Q. There are some people who are sensitive to fur while it is on the live animal?

A. Yes, sir.

By Judge Peters:

Q. What does it do to them?

A. They react to the fur, either by direct reaction to the fur or to the particles of skin that come off from it. A notable example—I mean an ordinary example of that is the person who has asthma or hay fever as the result of coming in contact with horses or cats or dogs, and if that particular person came in contact with the pelt of that animal, they would react the same way as they would to the live fur, but there is a distinct difference between that and reacting to a dyed fur.

Q. React in what way? Do you mean they smell it and it makes a bad impression on them, or what?

A. No, sir. If you, for instance, react to horse hair, to a horse or a dog, you may get a local reaction, in which case the exposed parts, like the face or hands, will break out with

a skin eruption or redness and oozing and so forth. You may inhale that product so that it affects your mucous membranes and as a result of that you get an eruption, [fol. 204] which we commonly call hives, or you may get a reaction on the mucous membranes like asthma.

By Mr. Chapman:

Q. What is the effect where the person is sensitive to the dye that is used on the fur?

A. A person sensitive to dyes reacts locally only, that is, it causes irritation of the skin with redness, swelling, oozing, and so forth.

Q. That is where the skin comes in contact with the fur?

A. In contact with the fur.

Q. You say that a very small percentage of cosmetics are harmful?

A. Are harmful to the general public, yes.

Q. What percentage would you say, Doctor?

A. I couldn't say.

Q. In your business you have had occasion to examine a great many specimens of different cosmetics, I assume?

A. No, sir.

Q. You have seen some, of course?

A. Yes.

Q. How do you know that some of them, even, are harmful?

A. Because of the reaction of the individual to those particular products, that is, to the finished products.

Q. Have you ever investigated to find out what ingredient in the cosmetic rendered it harmful?

A. No, sir.

Q. Is there anything in the appearance of a cosmetic to indicate whether or not it contains a harmful ingredient?

A. No, sir.

Q. What has been your experience concerning the effect of hydroxides on the nails, Doctor?

A. I have had no experience on that as a direct result of using those products on the nails. I have seen cases of some secondary infections of the nails following manicure processes.

Q. Would you say it was as a result of the manicure [fol. 205] processes?

A. I should say it was a result of the trauma by the manicure process, not the product used.

Q. Of what?

A. It was due to the trauma of the manicure process; otherwise, using the orange stick or what not; not the material used.

Q. Does nail remover have the same effect as the orange-wood stick? The orange-wood stick is used to remove the skin at the base of the fingernail?

A. It is used to push back the cuticle from the nail, as I understand it.

Q. What does the nail remover do?

A. You mean cuticle remover?

Q. Cuticle remover.

A. That dissolves the projecting part of the skin.

Q. Dissolving that—doesn't that allow the germ to enter where it otherwise would not?

A. Not unless you opened the skin down to the raw surface.

Q. Dissolving the skin will not do that?

A. The proper dissolving, the proper use of it, will not.

Q. So that a cuticle remover, unless used expertly, may be harmful, may it not?

A. I wouldn't say "expertly."

Q. What would you say?

A. I should say "used with reasonable care."

By Judge Wilson:

Q. When you say that only a small percentage of cosmetics is harmful to the general public, you mean to the users of them; you don't mean harmful to the people that don't use them at all?

A. I mean that there are out of the total number of cosmetics in existence today a few products which in my opinion are harmful to the general public.

Q. To the users?

A. Yes.

[fols. 206-207] By Judge Peters:

Q. You meant in those who are peculiarly susceptible to those things, did you not?

A. Yes, sir.

Mr. Blum: The plaintiffs offer in evidence the depositions which have heretofore been taken and filed in this court, and there is a stipulation that all this testimony may extend to both cases, both the Bourjois case and the Liggett case. Plaintiffs rest.

The plaintiffs rested.

[fol. 208] ELMER W. CAMPBELL, a witness called in behalf of the defendants, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Chapman:

Q. Dr. Campbell, will you state your name, please?
A. Elmer W. Campbell.
Q. Where do you reside?
A. Reside in Hallowell, Maine.
Q. How old are you, Doctor?
A. Thirty-eight.
Q. What is your occupation and business?
A. I am Director of the Division of Sanitary Engineering of the Bureau of Health.
Q. Of the State of Maine?
A. State of Maine.
Q. How long have you been such?
A. Eleven years.
Q. And what technical preparation did you have, scholastic preparation as well, for this position, Doctor?
[fol. 209] A. I was a graduate of Colby College, majoring in chemistry; one year in graduate work, at Massachusetts Institute of Technology, chemical engineering course; and a graduate of Harvard Technology School, Public Health Degree; D.P.H.; graduate of the University of Michigan, degree Doctor of Public Health; graduate of Officers' Engineering School, the United States Navy.
Q. Of what do your duties consist in your present position?
A. I have charge and supervision of the state enforcement and regulation of the state plumbing laws; supervision of the licensing and examination of beauty parlors, hair-dressing establishments, and operators of such estab-

lishments; supervision of licensing and inspection of various types of business catering to the tourist trade, such as the over-night camps, eating places, lodging places, summer hotels; supervision of the chemical laboratory with the duties of examination of all toxicological material which may come before the State, examination of samples of water, sewage, milk, and similar materials of a large variety which may come before the State.

Q. Did you state that part of your duties is enforcement of this Chapter 278, the Cosmetic Law, as we call it?

A. I didn't so state.

Q. That is true?

A. That is true, yes.

Q. In connection with your duties concerning the enforcement of this Cosmetics Law, have you had any occasion to examine and analyze any cosmetics?

A. Yes, sir.

Q. How many, Doctor?

A. We have reviewed perhaps two thousand. We have actually examined, chemically or otherwise, approximately, well I will guess—I can't make an absolute estimate offhand—I should say between two and three hundred.

[fol. 210] Q. Over what period of time has that examinaton extended?

A. Approximately two months.

Q. The past two months, Doctor?

A. Yes, sir.

Q. As a result of that examination and analysis of these cosmetics and cosmetic preparations, did you find any that were harmful, Doctor?

Mr. Blum: I think I ought to object to that as a conclusion. If the witness will state the ingredient or ingredients and then give his opinion, I think that will be much better than the mere blanket opinion that they are harmful or not harmful without stating what they consist of.

Judge Wilson: I think this would be admissible if he was inquired of as to what ingredients were harmful and caused the bad effect.

Mr. Chapman: The Court excludes my question?

Judge Wilson: Oh, no; he may answer.

A. Yes.

By Mr. Chapman:

Q. What percentage of the cosmetics you examined were harmful?

Judge Wilson: Percentage of those he examined? Of the two hundred he estimates he examined? Do you mean that?
Mr. Chapman: Yes, your Honor.
Judge Wilson: All right.

A. Approximately thirty-five per cent.

By Judge Wilson:

Q. Thirty-five?
A. Yes, sir.

[fol. 211] By Mr. Chapman:

Q. It might be well, Doctor, for you to explain your method of selecting the two or three hundred samples of cosmetics that you examined?
A. These two or three hundred are items which we suspected might have something in them which would be injurious or harmful, and therefore we analyzed those particularly, not testing a large group of others, which we had to defer until we have time to do it.
Q. In other words, they weren't taken indiscriminately from all cosmetic preparations?
A. No, these were not.
Q. In the examination of those cosmetics and cosmetic preparations, what ingredients did you find, Doctor, that caused you to determine that the cosmetics were harmful?
A. Arsenic, mercury, antimony, barium, caustic potash, paraphenylendiamine.

By Judge Peters:

Q. What is that?
A. That is a dye, an aniline or coaltar derivative dye. Betanaphthol. Arsenol. Capsicum. Salicylic acid. There may be others that I don't recollect offhand.

By Mr. Chapman:

Q. Where were these cosmetics or cosmetic preparations procured—which you examined and analyzed?

A. These were submitted to us by various manufacturers, with about four exceptions which we picked up on the open market.

Q. In the State of Maine?

A. In the State of Maine.

Q. What was the first harmful ingredient you mentioned, Doctor?

[fol. 212] Judge Wilson: Mercury.

A. Arsenic, I think, was the first one.

Q. You state that that is a harmful ingredient?

A. Yes, sir.

Q. What is the effect of it? In what way is it harmful, Doctor?

A. It is a direct poison to the system.

Q. When taken externally or internally or both?

A. It may be so either way.

By Judge Peters:

Q. You mean that arsenic outside on the skin will poison you?

A. Yes, sir.

By Mr. Chapman:

Q. You have heard it stated here this morning, Doctor, in the examination of a perfumery, as I recall it, it would require ten gallons to make an analysis of it. Is that true in your opinion of it?

A. It may be true under certain conditions.

Q. What are those conditions, Doctor?

A. I assume that would be true where you are going to make a complete chemical analysis in an effort to ascertain its chemical ingredients as such.

Q. Is there any other method of analyzing except in the way you have mentioned now?

A. Yes.

Q. What way is that?

A. A great deal of information and possibly even identification can be secured by optical methods of analysis.

Q. Any particular instrument that is used, Doctor?

A. Yes, there are two or three, the spectroscope, or spectograph, the refractometer, and the polariscope.

Q. Using any one or all of those instruments in analyzing, how large a working sample of perfumery would you [fol. 213] have to have in order to analyze it?

A. You could secure a great deal of information and possibly an analysis with a small quantity, such as an ounce or possibly somewhat less under certain conditions. Those can also be tested therapeutically perhaps with that quantity, where you wouldn't make an effort to find out the ingredients.

By Judge Wilson:

Q. Could you tell in that way whether or not they were harmful or harmless?

A. I think you could do that all right without attempting to find out what the ingredients were.

Cross-examination.

By Mr. Blum:

Q. Do you mean to tell the Court that if I give you a specimen of Coty's L'Origan, which is a well known perfume, you could examine that perfume by optical methods and then tell me what was in the perfume so that I could take those ingredients you report and assemble them and make a duplicate of that perfume?

A. I don't know the perfume in question.

Q. Let's take any compound perfume. Do you mean to tell the Court that if I provided you with a polariscope and the other optical instruments that you have mentioned, that you can take a compound perfume and by optical analysis tell the Court the raw ingredients of that perfume so that I could make up a duplicate of that perfume?

A. In some instances that probably would be true. Probably in other instances it would not be true.

Q. Mention a name of a single perfume on the American, French, or any other market, which you are able to analyze by optical means so as to make up a duplicate?

A. I haven't examined any because of the limited time [fol. 214] in which we have been given these duties. We have examined similar preparations of the aromatic oils and determined in such a way that we could find out something which gave a similar reaction. But to answer as near as I can, we have run into what perhaps you would call a

perfume, but what is used as such, an oil of mirbane, which could be tested by some of the means I have mentioned.

Q. Doctor, I am not talking about simple oils which have certain optical properties whereby they can be recognized by tests given in the ordinary handbooks. We agree that you can recognize some of these oils when they are isolated. But I have asked you a simple question and I would like a definite answer. Can you give me the name of any perfume, sold as a perfume in any part of the world, which you have been able to analyze by optical means so that it would be possible to duplicate that perfume?

A. We have not attempted to do that. Therefore, I will have to answer you in this case as no.

Q. Isn't it a fact, Doctor,—you have referred to the use of the polariscope—that some oils turn the beam of light one way and other oils turn the beam of light the other way?

A. That is probably true.

Q. Therefore, if you had a mixture of those two oils in your perfume, the effect upon your polariscope would be zero, and your polariscope would be of no use in telling you that those two oils are present in the mixture?

A. That may be so under certain circumstances, and then with additional tests you would have to attempt to find out whether or not that were true.

Q. Doctor, have you made any particular study of the chemistry of perfumes and their raw materials?

A. No, I have not.

[fol. 215] Q. Do you wish to state to the Court that you are an expert on the compounding or the analysis of perfumes?

A. I do not, because I have been only connected with this for about three months.

Q. Do you wish to state to the Court that you are an expert on the compounding or the manufacture of cosmetics?

A. No, sir. I never did that.

Q. Now, I believe that you stated that your Bureau had analyzed from two hundred to three hundred cosmetics since July the 1st. How many of these analyses did you personally make?

A. I did not make any. It was all done under my direction and my supervision.

Q. Take the preparation that contained arsenic. What was the name of the preparation?

A. Do I have to answer the question? The reason that I object, if your Honor please, is that we have in the regulations that such names should not be divulged except under certain circumstances. It would be detrimental perhaps to the manufacturer.

Judge Wilson: Does counsel wish to press the question?

Mr. Blum: I want the name of the preparation which the witness reported as containing arsenic. I would like to know the commercial name of it so that I can check up.

Judge Letts: The manufacturer, do you mean, or the character of the product?

Mr. Blum: Perhaps it would be better to divide it into two parts and first ask the character of the material and then possibly the name of the manufacturer; so, if your Honor will allow me to reframe that question, I shall do it. [fol. 216] Judge Wilson: You objected to the regulation, as to what it disclosed. Perhaps you better avoid it.

By Mr. Blum:

Q. Without giving the name of the manufacturer or the trade-mark, what was the type of preparation which contained arsenic?

A. It was a hair tonic.

Q. Was it advertised as a bleach?

A. No, sir.

Q. Just as a hair tonic?

A. A hair tonic.

Q. In what form was the arsenic, what salt or compound?

A. Trioxide.

Q. Have you with you the record or laboratory note sheet reporting the presence of arsenic?

A. I have merely a note of the number of the preparation as it appears on our books and the fact that it contained arsenic trioxide.

Q. What supervision did you make or did you exercise when that analysis was being made?

A. I directed my chemists to make the test, visiting them during the course of the test.

Q. In what percentage was the trioxide of arsenic present in that hair tonic?

A. Five thousandths of a per cent.

By Judge Wilson:

Q. How much?
A. Five thousandths of a per cent.

By Judge Peters:

Q. That is one five thousandths of one per cent?
A. Five thousandths of one per cent.

By Judge Wilson:

Q. Is that sufficient in your opinion to be harmful?
A. The reason we made this particular analysis was because a physician asked me why it was when he used that [fol. 217] particular tonic that it caused an irritation on his scalp and made it break out, and we analyzed it for that reason and found this present.

By Judge Peters:

Q. And you think that was the reason?
A. I believe so.

By Mr. Blum:

Q. Well, now Doctor, what experience have you had as a toxicologist which enables you to state that five thousandths of one per cent. of this particular arsenic compound would cause the skin to break out?
A. In this particular case the statement of the physician who actually used it.
Q. I am not asking you that. I am asking you what knowledge you have, what experience or training you have, that enables you to express the opinion that five thousandths of one per cent. of arsenic trioxide will be injurious to the user?
A. The only answer that I could give to that is: My medical training and general knowledge of the use of such substances.
Q. Can you refer me to a single textbook or authority to the effect that five thousandths of one per cent. of arsenic trioxide, applied externally to the hair, will have the slightest toxic effect?
A. I can't recollect offhand any that mentions that amount.

Q. You said one five-thousandths of one per cent.? I want that for the record. Is that correct?

A. I said five thousandths of one per cent.

Q. What were the other ingredients of that hair tonic which had this minute percentage of arsenic trioxide?

A. I haven't the record with me.

Q. Isn't it possible there was some other ingredient there which caused that irritation, and not this five thousandths [fol. 218] of one per cent. of the arsenic trioxide?

A. I don't think so.

Q. I believe you heard Dr. Blaisdell testify today about certain people being abnormally sensitive to certain substances—sometimes a food, sometimes a fur, sometimes something else. Do you agree or disagree with Dr. Blaisdell in that testimony?

A. I agree with him on that.

Q. Do you know of any materials in which that very minute percentage of arsenic trioxide might be present as an impurity?

A. Yes.

Q. What are those materials?

A. They may be food products.

Q. What products?

A. Food products—it might be present in that amount.

By Judge Peters:

Q. What effect would that amount have on the system taken as a food?

A. It might have some effect on the individual, if they are susceptible particularly to arsenic, and there is, as I understand, more or less dispute as to the quantities which it is necessary to cause an effect, owing to, as I am familiar with the work to some extent, the National Department of Agriculture, who are making great efforts to reduce the permissible amount of arsenic compounds in food products which have been sprayed with arsenical compounds, on the basis that that is causing injury to the general public.

By Judge Letts:

Q. Are there not some food vegetables that contain arsenic?

A. Very little naturally, but many of them contain it when they have been sprayed for the purpose of killing insects.

[fol. 219] By Mr. Blum:

Q. What has been the ruling of the Department of Agriculture for a food product which has been taken internally as to five thousandths of one per cent. of arsenic trioxide? Is that confiscated by the Department of Agriculture or still permitted?

A. As near as I can recollect, it is not confiscated.

Q. Let's take up the next material, which I think you said was mercury. In what compound or salt was mercury present?

A. Mercuric chloride.

Q. In what character of preparation was that mercuric chloride used?

A. That was used in an ointment.

Q. What was the purpose of the ointment?

A. I haven't the particular name with me.

Q. Well, I mean was the ointment used for antiseptic purposes—treating acne or sores? What was the ointment used for?

A. I had one which was of general use and it was just merely called a face ointment. Then I had one which contained mercury and was called acne lotion, and was apparently specifically intended for the treatment of acne, whereas the other one was not.

Q. Am I right or wrong in assuming that mercury bichloride is a common antiseptic used in many medicines?

A. That is true, and considered poisonous even in such use.

Q. A good many medicinal preparations, like patent medicines, sold on the open market, contain mercury bichloride, don't they?

A. I don't know.

Q. Don't you think, from your general knowledge of the field, that there are some patent medicines, openly sold in every drug store for external use, which contain mercury bichloride?

A. There may be, but I don't have that knowledge.

[fol. 220] Q. Well, then, this ointment, the first ointment,

was for general use upon the face; it might have been for treating eruptions, acne, or certain skin diseases; and the second one was for the specific purpose of acne cream. Am I right or wrong?

A. You are essentially right, as the first one had no particular label stating for what purpose it was used; it was just called ointment.

Q. Let's take the third substance—antimony? In what compound or sale was antimony present?

A. In the tartrate.

Q. What was the type of solution in which antimony tartrate was used?

A. A lotion to be used after shaving.

Q. In what percentage was antimony tartrate present in that lotion?

A. I regret I have not the percentage with me.

Q. Can you give us the other ingredients of that lotion?

A. Pratically so. It was mostly alcohol.

Q. Is it possible for antimony tartrate to appear in these preparations in minute percentages as an impurity which cannot be eradicated?

A. Possible in minute amounts.

Q. As a matter of fact, if we buy drugs which are passed according to the standards of the U. S. Pharmacopoeia, there is always a certain amount of tolerance even in those drugs, isn't there?

A. There is.

Q. And the presence of a minute percentage of a certain impurity does not mean that the drug should be rejected according to the standards of the U. S. Pharmacopoeia; isn't that a fact?

A. Not necessarily.

Q. Take, for example, talc, which is very largely used, I think you will agree, in the manufacture of face powders and dusting powders for infants. Now suppose that the talc contained one-tenth of one per cent. of calcium carbonate as [fol. 221] an impurity. Would you consider that that material would be unfit for use as a dusting powder on an infant?

A. No.

Q. Then it is possible for other materials to appear as minute impurities without making the main material unfit for use; isn't that a fact?

A. That may be true if those are nonpoisonous substances.

Q. Now take the barium. In what form did the barium appear?

A. Those are in various forms.

Q. Just give me the various forms in which the barium appeared in the preparations you tested?

A. Barium sulphide appeared in certain depilatory creams.

Q. In what other form did the barium appear?

A. Apparently in the form of a barium lake in a dye.

Q. Was that a hair dye?

A. No.

Q. A dye for what purpose?

A. In a lip-stick.

Q. What tests have you personally made in order to determine if barium sulphide when used in depilatories is harmless or dangerous in any manner?

A. I have made no personal tests.

Q. Can you refer me to any medical literature to the effect that barium sulphide, used in a depilatory according to proper directions, injures the skin of the user?

A. I don't know as I could refer you to a textbook offhand, although I can refer you to a report of the American Medical Society which states that fact.

Q. Have you that report?

A. I have.

Q. I would like to see that report?

A. If I am not mistaken. Do you wish me to refer to a particular page?

Q. Yes, show me the page, if you please?

A. Page 54, Report of the Bureau of Investigation in the Journal of the American Medical Association, Cosmetics and Allied Preparations, bottom of the page. May it please [fol. 222] the Court, I haven't had time to read that through thoroughly so I won't be able to say what it is entirely.

Judge Wilson: The Court may want to hear it.

By Mr. Blum:

Q. Where do you find any statement here that a barium sulphide depilatory, if used according to the directions, will injure the skin?

A. This states that Zip——

Q. I am asking you for a definite statement. I am not asking you to quote from this publication. If you find, in other words, a statement to the effect that a barium sulphide depilatory, when used according to proper directions, will injure the skin of the user, please point that out to me, and, if you can't point it out, don't read me anything else.

Judge Wilson: Who would expect an association to make such a report as that—if used according to proper directions? I think you better read what there is there on it and let us get it.

A. (Reading.) The depilatory comes in two forms, as a wax and a sulphide cream. The Zip wax, known as Zip Depilator, has been advertised under the claim, either direct or by implication, that it will permanently remove hair. This is untrue. While it is a fact that a removal of the hair by the molten wax method may destroy an occasional hair root, in general the hairs will grow again. Similar claims have been made for the Zip Depilatory Cream. In March, 1932, the advertising of both Zip wax and Zip cream were the subject of a complaint by the Federal Trade Commission. The Commission held that the truth and facts are that Zip wax will not permanently remove or permanently destroy and prevent the regrowth of superfluous hair. The [fol. 223] Commission also declared that Zip Cream Depilatory was not harmless and would not permanently destroy hair or prevent its regrowth.

Mr. Blum: I may say, your Honor, I am very familiar with the proceeding; I don't represent the Zip people, but I represent some other people, and all that that meant was this, that those people have made some highly exaggerated claims which they never had any right to make. The Commission found that it wasn't the fact and it isn't the fact that a barium sulphide cream is absolutely harmless under all conditions. In other words, if you allow that to remain on your skin for ten minutes, instead of a minute and a half as the directions state, that will not do you any good but will cause local irritation. But I don't think that supports the witness in his statement. That barium sulphide depilatory, which is sold in this country annually by the millions of pounds, is per se a harmless preparation.

Judge Wilson: I didn't get much out of that that had a bearing on this case.

Mr. Blum: It merely said that barium sulphide wasn't harmless and the Commission objected to the advertising that it was harmless, but it made no claim it was harmful. It depends on how you use it. We are not bound by this man's testimony. Here is a magazine that gives some report of what the Federal Trade Commission found. If there is going to be anything binding before the Court, at least we ought to have the full statement of the Federal Trade Commission, even if that is pertinent evidence.

[fol. 224] Judge Peters: You asked him for his authority for his statement. He was perfectly correct in giving his authority.

Mr. Blum: I think so. I have no objection to having that read into the record.

By Mr. Blum:

Q. In what percentage was barium lake present in the lip-stick that you analyzed?

A. I have the report in form of the ingredient barium.

Q. How do you know, what is there in your report that says, that barium was in the form of a barium lake?

A. That was by the test which we made as to the composition of the preparation.

Q. Well, in what percentage was this barium lake present?

A. The element barium was present in the percentage of .099 per cent.

Q. That is about one-thousandth of one per cent., approximately?

A. One-hundredth; approximately one-tenth of one per cent., .099, one-tenth of one per cent.

Q. Is this barium lake soluble material or insoluble material, referring to its solubility in water?

A. So far as I know, it would not be soluble in water.

Q. Now, do you remember being in New York when the deposition of Dr. Peck was taken? Were you present?

A. Yes.

Q. Do you remember Dr. Peck saying it was the most difficult thing in the world to cause a substance to penetrate through the skin?

A. I heard him say that.

Q. And that for many years the medical profession had been trying to find some coloring matter which would attach itself to the skin if applied externally?

A. I heard him say so.

[fol. 225] Q. And up to the present time they hadn't been able to find it?

A. I think that is what he said.

Q. Have you enough medical experience to disagree with Dr. Peck on that point, or do you wish to disagree with him?

A. In some instances.

Q. Beg pardon?

A. In some instances.

Q. Take this barium lake. What tests have you made, if any, in order to find out whether this barium lake would be absorbed by the skin or whether it would remain upon the surface of the skin?

A. I haven't made any.

Q. Can you refer me to any medical or other literature to show that barium lake, if applied to the skin through the medium of lip-stick, would be absorbed by the skin?

A. I haven't investigated that end.

Q. The caustic potash—what was that present in, a soap, a cuticle remover, or what?

A. I have some in cuticle remover.

Q. Is that all, just the cuticle remover?

A. I have a number of cuticle removers with varying percentages of caustic potash.

Q. Did you find caustic potash in a soap or in anything other than a cuticle remover?

A. We haven't examined any for it.

Q. You take an ordinary cake of soap. Is there some caustic potash in an ordinary soft soap?

A. Probably so.

Q. Would it be the viewpoint of your Department that some soft soap which contains a caustic potash should be excluded from the State of Maine?

A. Not unless it was unsaponified.

Q. D you mean to say that if a shaving cream contained some free caustic potash, even in a very slight percentage, [fol. 226] that you would exclude that from the State of Maine?

A. It would depend upon the percentage.

Q. What percentage do you consider objectionable?

A. We have so far considered anything in excess of one-tenth of one per cent.

Q. Well, if I am not mistaken, your regulation 4 (e) specifies——

A. (Interrupting.) I beg your pardon. May I change my answer there? It is one per cent.

Q. One per cent. I would like to ask you this question: When you said one-tenth of one per cent. before, does that mean that at one time you considered that one-tenth of one per cent. was objectionable and you afterwards raised that to one per cent. upon further investigation?

A. No, sir; we never considered the other.

Q. What tests have you made to determine whether or not a cuticle remover which contained, say, one and a half per cent. of free caustic potash, would be objectionable?

A. We have been undergoing experiments for the last two months in an attempt to discover what concentrations of caustic potash were irritating.

Q. At the time these regulations were formulated, how much actual experience had your Department had in investigating cosmetics?

A. We had had very little. We had had an occasional sample submitted to us because of the fact that injuries had been reported to us as having been caused, and under those circumstances we had investigated, but outside of that we had no duties in connection with it previous to the enactment of these laws.

Q. Is it fair to state that essentially these regulations were formulated without any actual experience by your Department?

A. We investigated and acquired all the information that we could elsewhere before they were drawn.

[fol. 227] Q. Now, take the next material, the paraphenylendiamine. I suppose that was a hair dye?

A. Yes.

Q. How about the betanaphthol? Was that hair dye?

A. No; that was used to dye the eyelids or eyebrows. You might call it a dye.

Q. Salicylic acid—what was that used for?

A. That was in a plain cream. No other claims made. Just cream.

Q. In what percentage was that present?

A. Twelve.

Q. Twelve per cent. What other ingredients were present?

A. We didn't attempt to identify the various ingredients, as it was in the nature of a cold cream.

Q. Did you hear Mr. Fuller testify this morning that you might have a substantial percentage of carbolic acid in a preparation if there were camphor, because the presence of the camphor would neutralize any effect of the carbolic acid?

A. Yes, I was here when he said that. That would be true for camphor but not for other substances.

Q. I will ask you this: As a general fact, before you can determine whether an ingredient in a cosmetic is harmful, or may be harmful, don't you think it is necessary to know all the other ingredients in that preparation in order to see what the combined effect will be?

A. We do, but we haven't had sufficient time to get in that far in the investigations yet.

Q. The answer is you cannot give me the other ingredients which were present in this cold cream that contained the salicylic acid?

A. I could in half-a-day's time, because I have the record at the office.

Q. After the salicylic acid I believe you mentioned two additional substances whose names I could not record. What were those two substances, please?

A. Phenol possibly.

[fol. 228] Q. Capsicum and resorcin?

A. Maybe so, and perhaps phenol.

Q. Now take the preparation which contained phenol, can you give us the ingredients other than the phenol which were present in that preparation?

A. I haven't the record with me and I can't recollect, but I have the information on file.

Q. Take the capsicum. In what form of preparation was the capsicum present?

A. It was in the form of so much of the tincture.

Q. What was that, a dye?

A. No; it would be, oh, probably an alcoholic solution.

Q. I mean, what was the purpose of this preparation which contained the capsicum?

A. It was used as a hair tonic.

Q. In what percentage was the capsicum present?

A. I haven't the information available here.

Q. The resorcin preparation—what type of preparation was that?

A. That was on a freckle remover.

By Judge Wilson:

Q. On what?

A. A freckle remover.

By Judge Letts:

Q. Isn't capsicum used in the preparation of several different brands of ginger ale that are sold to the public?

A. Yes, sir, without doubt. It is well recognized as an irritant.

Mr. Blum: I know that capsicum is present, I am quite sure, in Cliquot Club Ginger Ale; at least, it was there at one time.

[fol. 229] By Mr. Blum:

Q. Do you know of any regulation of the Federal or any other government prohibiting the use of a small amount of capsicum in ginger ale or other drinks?

A. I don't know of any.

Q. Capsicum in plain language is pepper, isn't it—red pepper?

A. Absolutely.

Q. Pepper is used as a condiment in much larger percentages than the capsicum in ginger ale, isn't it?

A. I should imagine so.

Q. Take, for example, that hot sauce used on oysters, Tabasco Sauce. That contains a good deal more capsicum than the capsicum that you report, isn't that a fact?

A. I don't think so. This was very strong.

Mr. Blum: Cross-examination closed.

Redirect examination.

By Mr. Chapman:

Q. You have spoken of the U. S. Pharmacopoeia. Just what do you mean by that, Doctor?

A. That is a publication which sets up certain standards for the grade of purities of the various raw materials used in the pharmaceutical business.

Q. That is recognized as an authority all through the United States?

A. I believe it is.

Q. And in making your analysis of cosmetics and the preparations, or, rather, first, does the United States Pharmacopoeia set up any standard with regard to any of the poisons which you have mentioned here today?

A. It only give methods of testing for their recognized purity.

Q. So that if you examine a cosmetic and find a certain percentage of some ingredient which you say is harmful, you cannot turn to the U. S. Pharmacopoeia to determine [fol. 230] whether or not that percentage is greater than it should be in the article?

A. I don't think so. It gives certain dosages, that is all.

Q. Inquiry has been made of you concerning the formulation of the Regulations by the Bureau of Health. What was the source of your information, Doctor, when those Regulations were made?

Mr. Blum: I really think I must object to that. Sources of his information are not binding upon us.

Mr. Chapman: May it please the Court, it is all in line with my brother's examination.

Judge Wilson: I don't know whether it is very material or not, but the other side brought out that he relied on it. I don't know as it would be of any help.

Mr. Chapman: I am willing to withdraw it.

(Last question withdrawn.)

By Mr. Chapman:

Q. You mentioned one poison which, when combined with camphor, would be rendered harmless?

A. Yes.

Q. What poison is that?

A. Phenol, commonly called carbolic acid.

Q. In response to my brother you mentioned several other harmful ingredients found in cosmetics and cosmetic products?

A. Yes.

Q. As you just testified to him?

A. Yes.

Q. And he asked you if you had examined those cosmetics and cosmetic preparations for other ingredients which might neutralize the poisons which you mentioned, did he not?

A. Yes.

Q. Do you know of any neutralizing agents to those other poisons mentioned?

A. There were none.

[fol. 231] Mr. Chapman: The defendant closes, rests, your Honor.

Rebuttal

HENRY C. FULLER, recalled in behalf of the plaintiffs, testified in rebuttal as follows:

Direct examination.

By Mr. Blum:

Q. Mr. Fuller, you have heard the testimony of Dr. Campbell as it was given?

A. I have.

Q. Now taking up the first material that he mentioned, arsenic five-thousandths of one per cent., please state your opinion as to whether this minute percentage of arsenic can have any toxic or harmful effect as applied to a cosmetic?

A. No. I should say it was an impurity in some of the other ingredients, although I didn't catch what the type of product was. Glycerine sometimes contains arsenic as an impurity and, if it was a product that had glycerine in it, there might have been that small quantity. But it is extremely minute.

Q. If glycerine had that small amount of arsenic as an impurity, would that glycerine be fit to use externally or internally?

A. I wouldn't say internally, but externally, yes.

Q. How about the barium-sulphide depilatory that has been mentioned by Dr. Campbell? How many years have [fol. 232] you been working with barium-sulphide depilatories?

A. Well, at least five; possibly more.

Q. What have you done personally in the way of making personal tests as to the effect of barium-sulphide depilatories?

A. Well, we have experimented in our laboratory in an endeavor to improve the character and quality of the cream in which it occurs—my various assistants as well as many others in the plant where it is made. We never have seen any harmful effect, and in some cases it stayed on as long as ten minutes.

Q. How many pounds of barium-sulphide depilatory cream have been used in those tests, approximately? Has it been a couple of hundred or ten pounds, or what?

A. You mean just in the tests alone?

Q. In the tests alone.

A. Oh, we probably haven't used all together more than a pound, I wouldn't say, because the amount you put on is very small.

Q. What can you say as to the sales in this country of barium-sulphide depilatories during the last five years? Have they been large or have they been small?

Mr. Chapman: May it please the Court, has the witness been qualified to answer any such question as that?

Judge Wilson: I don't know.

Mr. Chapman: I object to the question.

Judge Wilson: I don't see as it is very material.

Mr. Blum: I will withdraw the question to this extent: I would like to show, if possible, that this is a material which is in very much use; in other words, it is not something that has not been thoroughly tested by much public use.

Judge Wilson: You may ask him if it is in general use for that purpose.

[fol. 233] By Mr. Blum:

Q. Is barium-sulphite depilatory in general use throughout the United States?

A. Yes.

Q. For how many years has it been in general use throughout the United States

A. I can recall finding it as far back as 1914 in depilatories?

Q. Dr. Campbell mentioned a cream which he said contains twelve per cent. of salicylic acid. He couldn't state

the purpose of that cream. What preparation would use twelve per cent. of salicylic acid?

A. I can't conceive in any cream intentionally putting in twelve per cent. of salicylic acid, unless it was a corn remover cream. I don't think they would have as much as twelve per cent. in that, even. That is a very high percentage. I think there must be some misunderstanding there of the product.

Q. Dr. Campbell gave his opinion as to some preparations without stating the complete analysis of each preparation. Is it possible to give an effect as to the harmfulness or harmlessness of a preparation without stating all the ingredients?

A. (To Reporter.) Will you repeat that?

(Question read by the reporter.)

A. You mean give "an effect" or "an opinion"?

Q. Is it possible to give "an effective opinion", I think I said.

A. It is hard to answer that question. Of course, in some cases, yes, you could determine it very quickly, but there are others where you couldn't. It is a little difficult to answer that question.

Q. Take the barium lake which was reported by Dr. Campbell. Can that be absorbed through the skin?

A. In my opinion, no.

Q. Is it an easy thing or a very difficult thing to cause [fol. 234] materials to be absorbed into the human system through the skin?

A. Very difficult. I think I explained that point with reference to lip-sticks this morning.

Q. How about capsicum and resorcin if present in small quantities? Do they have any injurious effect as applied to a cosmetic?

A. In my opinion capsicum is never used in sufficient quantities to produce any deleterious effect. If it was, you couldn't use it at all; it would be too irritant, that is, a person would object to its use. And a moderate amount or resorcin in hair tonics is for the removal of the parasitic cause of dandruff and is perfectly harmless, and I think generally recommended by the profession.

Q. Generally speaking, referring to all substances Dr. Campbell said that he had found in cosmetic preparations, which he characterized as harmful, is it your opinion, with

the possible exception of paraphenylendiamine, that those are harmful ingredients?

A. I would include mercury.

Q. Mercury bichloride, he said, was used in acne cream or some kind of general cream. Would you classify that material as a cosmetic or a medicinal preparation?

A. I personally classify it as a medicinal preparation.

Cross-examination.

By Mr. Chapman:

Q. I suppose you attempt to keep abreast of the times by consulting the various works bearing on your profession, do you not?

A. I try to keep up to date.

Q. Are you acquainted with "Legal Medicine and Toxicology" by Webster?

A. Yes.

Q. Is that a well-known work?

A. It is.

Q. Recognized as an authority?

A. It is.

Q. What is your opinion concerning the absorption by [fol. 235] the skin of lead?

A. Well, I described my own experience with it this morning. If you recall, I think I explained to the Court from the tests I made and they were made with the collaboration of a pharmacologist and pathologist—that there was no absorption through the skin, that is, the skin or scalp on which this product was applied.

Q. Mr. Webster in this work—do you agree or disagree with what he says—says (reading): "Lead is absorbed from the respiratory tract, from the gastrointestinal tract, and through the skin." Do you agree or disagree with Mr. Webster in that statement?

A. I agree with the first two phrases, through the respiratory tract and through the digestive tract, but not through the skin, and I will say that those statements have been handed down from one toxicologist to another without any actual experiments on the parts of them themselves.

Q. How do you know that?

A. Because they use almost those identical phrases.

Q. You are not prepared to make the statement you did, are you?

A. Well, perhaps I better not say anything about my brother professional members. I review a great many books.

By Judge Wilson:

Q. Your experience is different from theirs?

A. I have reviewed a good many books in my day, sometimes going back fifty years. I see the same quotations coming down the line without any variation. That man though is very good authority.

By Mr. Chapman:

Q. Do you agree or disagree with Mr. Webster in this statement of his (reading): "Referring to white arsenic, it [fol. 236] has as a rule been administered by mouth, but quite a few cases are on record of death from external application of arsenical pastes in the treatment of cancer, and occasionally it has proven fatal by introduction into the vagina"? Do you agree or disagree with Webster on that?

A. I agree with that, yes, sir.

Q. Do you agree or disagree with Mr. Webster's following statement (reading): "Mercurial poisoning has occurred from oral ingestion, from inhalation of mercurial vapor"—do you agree with those?

A. I do.

Q. (Continuing to read.) "From absorption through the unbroken skin"?

A. I think that is correct. Mercury is very easily absorbed. It is one of the most easily absorbed we have of inorganic drugs.

Q. Do you agree or disagree with Mr. Webster in the following statement (reading): "Pyrogallol has caused poisoning from absorption through the skin"?

A. Did I testify anything about that?

Q. Do you agree or disagree?

A. I do agree.

Mr. Blum: I have no objection to this going on. Nobody has testified about pyrogallol up to the present time. We can run through the dictionary and get a great deal of information.

Judge Wilson: We don't want to get outside the case. I am not familiar with the name. I don't know what it was now.

[fol. 237] J. HARPER BLAISDELL, being duly sworn, testified as follows:

Direct examination.

Mr. Blum:

Q. Will you please state your full name, age, residence and your occupation?

A. J. Harper Blaisdell, 45 Bay State Road, Boston; age fifty; occupation, physician.

Q. Will you please state your experience and training as a physician with particular reference to any specialization as a dermatologist?

A. I am a practicing physician, specializing in dermatology. I graduated from Harvard Medical School in 1911; I was house physician in the dermatological department of the Massachusetts General Hospital in 1911 and 1912, and I was in the skin department of that hospital in various capacities from 1912 to 1930. For a period of six or seven years I was the head of the skin department of the Boston Dispensary. I was a member of the teaching staff in various capacities at the Harvard Medical School in the department of dermatology for about eight years. I am a member of the Massachusetts Medical Society, the American Medical Association, the American Dermatological Association, the American Board of Dermatology, and at present I am president of the New England Dermatological Association. At the present time I am a consultant in dermatology in numerous hospitals in and around Boston.

Q. Will you state your specialization and experience in relation to the properties, formulæ and so forth of cosmetic preparations?

A. The question of cosmetics and their use and the effects [fol. 238] of them are a part of the routine practice of dermatology.

Q. And for how many years have you specialized in the study of cosmetics and their effects upon human beings?

A. I haven't specialized on the effects of cosmetics only insofar as they are a part and parcel of the practice of dermatology. I have practiced dermatology since 1912 exclusively.

Q. Is it fair to say that since 1912 you have had occasion to investigate the effects of cosmetics of all kinds on the human body?

A. Yes, sir.

Q. You have also treated a number of cases where skin eruption resulted from the use of certain cosmetics?

A. Yes, sir.

Q. You have studied the literature relating to cosmetics?

A. Yes.

Q. Have you on occasions prescribed cosmetic preparations according to formulæ of your own?

A. Yes, sir.

Q. Please state your knowledge and experience with respect to cosmetics which may be poisonous in relation to dermatology, from your knowledge of the field and from the weight and the concensus of medical opinion?

A. There have been in the past, and are today, a certain number of cosmetics which are injurious to the general public, the health of the general public. The number of those cases, in proportion to the amount of cosmetics used and the number of people using them, is very, very small. It is an infinitis-mal percentage of those who are using cosmetics.

Q. Would you mind naming the preparations which you [fol. 239] have in mind, and which are injurious to health in general?

A. In the last few years there have been several groups of cosmetics which have been injurious. One of them is a preparation—Shall I name them by name?

Q. Yes. If you please. I think the Court would wish it.

By Judge Peters: I would like to hear what they are.

By Judge Wilson: And what the ingredients are that are injurious.

A. One of the group is a preparation called "Lash Lure", which was a dye to dye the eyebrows and the eye-lashes. That particular dye was easily absorbed by a broken surface of the skin, where the surface was broken in the process of pulling out the eye-brows, and the preparation was absorbed through the mucous membrance of the eyes; and, as a result—as a result of using this particular preparation a number of people were seriously injured, a good many were permanently blinded, and there were several deaths. About this same time a new depilatory came on the market, for the purpose of removing superfluous hair and hair under the arm-pits and so forth, and that par-

ticular preparation contained thalium acetate, and the action of that wasn't any chemical action on the surface of the hair itself but it does it by internal absorption which caused the hair to drop out and sometimes permanently destroyed it. Thalium acetate was a poison and acted as such in a good many instances, and as a result of its use some of them were severely injured and some died.

Q. Are they on the market now?

A. No.

By Judge Wilson: How long ago were they?

A. The Lash Lure episode came up in 1933 and '34, and [fol. 240] the thalium acetate about that same time.

Mr. Mock: Perhaps it might be in order for me to state to Your Honors at this time that the plaintiff in this case manufactures no dyes, hair dyes or depilatories of any kind, and that the depositions which were taken, to which I do not think the Attorney General offers any dispute, show that plaintiff's preparations are absolutely pure and harmless in every respect and have been on the market for fifty years or more without any complaint.

Q. Now you have specified two preparations as injurious to the public's health; now are there on the market today creams, powders, lip-sticks and rouges which are absolutely harmless to more than ninety-nine percent of the consumers?

A. Yes, sir.

Q. Now in the case of a very small percentage of one percent of the consumers, is there a phenomonen which is designated as allergy, or hyper-sensitivity?

A. Yes.

Q. Describe to the Court just what that is.

A. Allergy is the reaction of a given individual to some particular product in a way in which the average individuals do not react. The commonest example, I suppose, of allergy is the reaction of the given individuals to poison ivy. A large proportion of the population is not sensitive to poison ivy, but there is a considerable proportion of the population that comes in contact with the plant and they will react; and that is an individual proposition. The reaction of some people to take shellfish—lobsters and clams and so forth—whereby they break out with what is

known as hives or urticaria—swelling of the skin and gastro [fol. 241] internal disturbance; that is the reaction of the individual to lobsters and clams when the fish is in good edible form. And in the same way certain individuals react to the various things that go into the manufacture of cosmetics, and I think it is a fair thing to say that there is no substance which may not cause some individual to react at some time during that individual's life. As an example of a common thing is the reaction of some people to orris powder—which is a constituent of tooth-powders, tooth-paste and face powders; and that same thing applies all down the line.

Q. Do you know of any material or food which would not be poisonous, or have the effect which you have described, on certain hyper-sensitive persons?

A. No. There is none, that I know of.

Q. How about furs and certain materials and cloth? Does the phenonomen of allergy apply in those cases?

A. Yes. People react to furs in two ways. They may react to the animal itself—the animal fur, untreated. Or they may react to the dyes used in the purpose of preparing it for use.

By Judge Wilson: Is that true of woolens?

A. It is true of wool, as wool; and it is true of the dyes of wool.

By Judge Wilson: Are there any particular preparations the use of which affects people generally?

A. Of cosmetics?

By Judge Wilson: Yes.

A. No, sir.

By Judge Wilson: Or is there any ingredient that has any effect?

[fol. 242] A. There is no ingredient of any cosmetic that will affect everyone. There are certain ingredients that affect a larger percentage than others.

By Judge Wilson: What are those?

A. Principally the dyes. You get more reaction from the dyes than from other things.

Q. Excluding dyes, is it fair to say that the number of persons who may be affected by cosmetics or their ingredients is a great deal less than one percent?

A. Yes. Less than one tenth of one percent.

Q. And, while dyes are not in issue in this case as far as the plaintiff is concerned, according to your experience and the weight of medical opinion, what is the percentage of persons who are hypersensitive to dyes?

A. It is hard to answer that, but it is a very tiny percentage out of the total number of people. Two or three years ago statistics were taken on that from about sixty skin specialists in the United States, and it was estimated that there were fifteen million people using dyed furs, and they got a history of only one or two hundred reactions to those particular things. In my own experience, I see perhaps three or four cases a year. In my own specialty—and I am put in a position to see a good many of them in connection with medico-legal work.

By Judge Wilson: I suppose these people who consulted a physician would be the marked cases. There must be some who are slightly affected.

A. If they are affected at all they usually are affected enough—they usually get enough of an irritation and trouble [fol. 243] from it to go to a physician. If they don't on the first exposure a continued exposure will bring increased activity. So ninety out of a hundred who are allergic would be in the doctor's hands.

Q. Is it fair to say that the number or percentage of persons who are allergic to certain foods and certain materials of clothing is at least as great as the percentage who are allergic to cosmetics?

A. It is much greater.

Q. In which case?

A. It is greater in foods than it would be in cosmetics.

Q. In the treatment of patients at hospitals and by doctors, are such things as dusting powders and creams of various kinds prescribed and used?

A. Yes, sir.

Q. Would these powders and creams have the effect of treating or improving the scalp, face, neck, shoulders, arms, hands and the like?

A. Yes, sir.

Q. Can the doctors, under their own prescriptions, provide any formula for a powder, or dusting powder or face cream which will not affect these allergice reactions?

A. No, sir.

Q. How about the use of adhesive tape. Does that have an allergic reaction on certain people?

A. Yes. Very often.

Q. Can you give any instance of that?

A. The number that are reactive to adhesive tape is so relatively large that it is pretty good practice to inquire of your patient before you strap him up to any extent if he [fol. 244] does react to it; and where you do get a reaction to it you get an outbreak of the skin that may be as severe as an outbreak of poison ivy. The substances causing the reaction in adhesive tape are the rosins that are used in the adhesive material.

Q. Now in cases where certain persons are allergic to cosmetics—with the exception of the Lash Lure and the thalium acetate, is the reaction a permanent one? Does it disable a person? What effect does it have?

A. The reaction to powders and creams and things of that general type is simply an irritative effect which lasts only as long as the person comes in contact with that material.

Q. And the irritative effect produces any permanent or lasting injury?

A. No.

Q. Does it disable the person?

A. Except in very severe cases. Temporarily. Not permanently.

Q. Are these severe cases exceptional or are they frequent among allergic persons?

A. No. They would be very exceptional.

By Judge McClellan: Don't cosmetics differ, some from the others, in their ingredients?

A. From what others?

By Judge McClellan: Don't the cosmetics that are now generally sold—leaving out those to which you have referred—differ in their composition and their quality?

A. Differ among themselves?

[fol. 245] By Judge McClellan: Differ among themselves. Or don't you know?

A. Yes. If I understand your question; they differ only in a general way. That is, specifically, a cold cream to be a cold cream at all has to be made in pretty much the same general fashion.

By Judge Wilson: There are different houses that make them?

By Judge McClellan: Aren't the contents of some cold creams different from the others. I would like an answer to that, because I am going to ask you something else.

A. Yes. They are different in percentages and in types; but cold cream is really one given substance or else it isn't a cold cream.

By Judge McClellan: Don't cosmetics differ from one another as to the number of persons who may be adversely affected by them?

A. Yes. Yes, indeed.

By Judge McClellan: Is there any question about that?

A. None. No, sir.

Q. May I ask you to elaborate upon your last answer to the Court, as much as you can, and give us full details.

A. As to the types of cosmetics causing more trouble than others?

Q. I think that was the general purport of the question. I would like to have you answer that.

A. Take ordinary face powders, as such, and there would be there a minimum of reaction, I should think, in those us-[fol. 246] ing face powders. These face powders would be in about the same group as cold creams, or cleansing creams, or tissue creams, or nourishing creams. If you get into the next grade of activity in cosmetics, such as freckle removers or preparations for the hair, like hair tonics or hair ointments, then you have got—because of their content which has to be more or less active to have effect on those conditions—you will have a larger number of reactions.

By Judge McClellan: Well, wouldn't you have a larger number of reactions from some kinds of face powders than you would have from other kinds of face powders?

A. You have reference to face powders that may contain metals?

By Judge McClellan: I am talking about face powders generally upon the market; and I want you to answer whether or not there are some of those face powders where the allergic effect is more extensve than in the case of others?

A. Yes. I think that is true. A face powder that would contain orris, for instance, would give a larger number of reactions than those that didn't.

By Judge McClellan: So that the allergic effects differ, not only as between the various types of cosmetics, but among cosmetics of the same type? That is right, isn't it?

A. Yes, sir.

Q. Now, as to the orris, do people who are allergic number more than a small fraction of one percent of the users?

A. No. A very small percentage.

Q. And would your answer apply to the allergic affect of [fol. 247] all the cosmetics? That the persons allergice to them, at the most, constitute a very small fraction of one percent?

A. Yes, that is true.

Q. And that the same percentage of persons that are allergic to special powders and ointments that are provided by physicians, or prescribed by physicians?

A. Yes.

Q. And that even a larger percentage is allergic to adhesive tape?

A. Yes, sir.

Q. Referring to Section 3 of the Statute; this states, in substance that household and toilet soaps shall not be held to be cosmetic preparations. Will you state to the Court the injurious effects upon the skin, of ordinary soap, as compared with the cosmetic preparations?

A. Soap, as a group, gives a great deal more trouble than do cosmetics. And I should say that the "great deal" would run 100 to 1, or about that proportion.

Q. For what reasons do soaps have this much larger percentage of reaction upon sensitive persons?

A. Because of the character of the soap, and the purposes for which soaps are used.

Q. Now referring to toilet soaps; for how many years have liquid soaps been a well known article of commerce?

A. I don't know; it was here before my time.

Q. Are liquid soaps adapted to the use of shampoo preparations?

A. Yes.

Q. Is there any essential difference between the formulae of the shampoo preparations and the formulae of liquid [fol. 248] toilet soaps?

A. No. They are both liquid soap.

Q. Has there been on the market for ten years or more, and is there on the market now, a so-called "cold cream" or "superfatted" soap?

A. Yes, sir.

Q. Are they designated as toilet soaps?

A. Yes.

Q. Why are they designated as cold-cream soaps or a super-fatted soaps?

A. Because they contain a greater amount of fat, which is soothing to the skin of the patient for use during the winter months.

By Judge Wilson: What does the statute say as to this? Is there a use of the term super-fatted?

Mr. Blum: No. Not of that term.

By Judge Wilson: I thought I remembered seeing it.

Mr. Blum: I think I possibly mentioned it in my opening.

Q. Referring to the cold-cream or super-fatted soaps, have they the same ingredients as face creams of the cold cream variety?

A. Yes, sir. Generally.

Q. And would these same ingredients produce the same reaction in the case of toilet soap that they produce in the case of a face cream?

A. Yes. They may.

Q. Now referring to the vanishing cream, for example. [fol. 249] Are they amongst the class of face creams?

A. Yes. They are face creams; but they are of the soap type.

Q. Essentially what difference is there between a vanishing cream and a super-fatted toilet soap in composition and in their effect upon the human skin?

A. I can't answer that as regards composition. Not intelligently. But as to the effect upon the skin; your superfatted soap is more of a protective; whereas your vanishing cream has more of a transient effect and is rubbed in and rubbed out again.

Q. Insofar as any allergic reaction is possible, is it just as possible for an allergic reaction in the case of a superfatted soap as in the case of a vanishing cream?

A. Yes, sir.

Q. Please state your opinion as to whether cosmetics of the covering type,—creams, rouge, lipstick or the like—have any beneficial and protective effect upon the individual?

A. They do have such a function.

By Judge Wilson: I think you should have a woman try this case. It is getting by me.

By Judge McClellan: I tried a case once where they said there was an old woman on the bench.

By Mr. Blum: Direct examination closed.

Cross-examination.

Mr. Farris:

X Q. Doctor, in all these cosmetics that you have spoken of, they are made up of different ingredients; different cosmetics,—different brands?

A. Yes, sir.

[fol. 250] X Q. And you don't know what one brand may be, or another brand, do you? From different manufacturers?

A. I know what—I know insofar as their purpose denotes what their composition is in general.

X Q. But you don't know the composition of all cosmetics on the market today in the State of Maine?

A. No, sir.

X Q. And some may be injurious to persons? Some percentage?

A. Yes, sir.

X Q. As far as you know?

A. Yes, sir.

X Q. And some may contain poisonous matter, as far as you know?

A. Yes, sir.

X Q. I will ask you if face powders containing red lead as the coloring agent are poisonous?

A. Yes. They would be grouped as objectionable, from my point of view.

Redirect examination.

Mr. Blum:

Q. Have you, in your experience, ever come in contact with any face powder which contained red lead?

A. Not in my experience.

Q. As a part of your training and experience have you made yourself generally familiar with the cosmetics which have been on the market since 1911?

A. In a general way. Yes.

Q. Have you checked up on text books which give formulae used by the industry?

A. Yes, sir.

Q. May I ask you whether the testimony which you gave [fol. 251] on direct examination reflects not only your opinion, but is also according to the concensus and weight of medical opinion?

A. Yes.

Q. And on certain points is there a difference of medical opinion and can honest physicians honestly disagree as to whether a preparation is injurious or not?

A. Yes, sir.

By Judge Wilson: I don't suppose it is possible to state how many kinds of tonics—for the purpose of massage and so forth of the scalp, head, face, neck, and so on, how many kinds of tonics are on the market?

A. It would run into the thousands.

By Judge Wilson: And I suppose the lotions would be equally large?

A. Yes, sir.

By Judge Wilson: It isn't possible, I suppose, to give any statement as to what those tonics or lotions, etc. contain? Would they vary in their ingredients?

A. They vary within certain limits.

By Judge Wilson: What are the elements to which the sensitive person reacts?

A. There is no one specific element that you can pick out. If you have a patient who comes to you who is apparently allergic to cosmetics you have to test everything that they are coming in contact with. It may be anything.

By Judge Wilson: Is there one ingredient that produces that result more than others?

A. No. Not when it comes down to the individual case.

(Witness excused.)

[fol. 252] [Title omitted]

ELMER W. CAMPBELL, being duly sworn, testified as follows:

Direct examination.

Mr. Blum:

My name is Elmer W. Campbell; my residence is Hallowell, Maine. I am Public Health Officer of the State Bureau of Health. I have charge of a division of the Department of Health and Welfare of the State of Maine. This division has the duty, under the direction of the Bureau, under the direction of the Director of the Bureau of enforcing Chapter 109 of the Public Laws of 1935.

I am acquainted with what has been done by the Department up to the present time relative to making such regulations as may be necessary for carrying out the purposes of the Act. No regulations have been made up to the present time and officially issued. The Department, up to the present time has not issued any ordinances, as provided for in Section 10 of the Act. The Department, up to the present time has not issued any by-laws of the kind provided for in Section 10 of the Act.

[fol. 253] "Q. Has the Department, up to the present time, designated anybody to go to the various retail stores in the State of Maine, or other establishments where cosmetic preparations are kept, in order to inspect and analyze the cosmetic preparations?

A. Well, I can answer part of the question by description, but I can't answer the whole question by either 'Yes' or 'No', because we have done part of it.

By Judge Wilson: There has been some investigation?

A. We have had people visiting all the stores in the State within the past year merely to find out who were selling such things, to prepare us to enforce the law later.

By Judge Wilson: Selling all cosmetics described in the Act?

A. Yes, sir.

Q. Does that mean that during the last year the Department has sent people around to the various retail stores and other establishments in the State of Maine in order to see who manufactures the various preparations in the retail stores? Do you mean that?

A. No. I meant that we visited, through agents, the various retail stores of this State to find out who were handling such things, so that we would be prepared, later, when this Act became effective, to visit or notify or give instructions as to what should be done.

Q. Since the Act has been passed has the Department confined itself to the activity you have just mentioned, insofar as investigation is concerned?

A. Well, the Department has proceeded to test various preparations which have been submitted to is.

A. I didn't ask you that question. Has the Department designated men, employees of any kind, to visit the retail stores in the State of Maine, pick out samples of the cosmetic preparations offered for sale in these retail stores, and bring them to your laboratories for purposes of analysis?

A. When you say 'designate men for that purpose only', my answer would be no. But that wouldn't be complete; because we have picked up various preparations and caused them to be analyzed.

By Judge Wilson: Preparations sent in to you? Or * * *."

We have purchased in the open market certain cosmetic preparations and brought them to the laboratories for analysis. I have attempted to investigate beauty shops in the State of Maine who make their own cosmetic preparations. I have secured specimens of cosmetics made in this State by these beauty shops, for analysis.

[fol. 254] No attempt has been made to determine what portion of the time of these investigators or inspectors was spent in picking up cosmetics for the purpose of analysis, and what portion of the time of the inspectors was devoted to other duties.

"Q. What other duties do those employees have, in addition to that of picking up of samples of cosmetics?

A. One was entirely—his entire time was spent in visiting stores for the purpose of ascertaining who were handling, at retail, cosmetic preparations. That was the activities of one agent. Another agent's duties were—consisted of—making routine inspection of beauty parlors for the purposes of determining whether or not they are conforming not only with the hair-dressing law, but to see whether they are handling cosmetic preparation. That is also covered by another Statute——

By Judge Wilson: What is the other Statute?

A. Chapter 112 of the Public Laws of 1935, which is an amendment of a previous law.

By Judge Wilson: An amendment to the old statute?

A. I can give it to you. Regulation of hair-dressing establishments. Chapter 282 of the Public Laws of 1933, I think, was the original Statute. And this is an amendment to that. That was a hair-dressing Statute.

By Judge Wilson: I understand you have no authority under this Statute to go into stores and make inspections? Or investigations?

A. That is true. We merely went in and asked the name of the proprietor, in that case."

Up to the present time the Department has not designated any employee or employees whose duties shall consist solely of visiting retail stores in the State of Maine, inspecting the stock of cosmetic preparations and picking up and having samples analyzed.

"Q. Are you acquainted with the intention of the Department relative to the enforcement of the statute in issue?

A. I could answer that partially."

[fol. 255] I assume that when proper facilities are provided the Department will probably start prosecution under this Statute against drug stores who may buy unregistered preparations of the plaintiff herein after January 1st, 1936?

If today I found that some drug store in Maine had brought in a stock of the plaintiff's preparations in original packages and intended to offer them for sale, I assume

it would be the Department's intention to enforce this Statute against that drug store.

There is no question in my mind about this, it is merely a question of the ability to have a reasonable case. I mean reasonable from the standpoint of the likelihood of carrying it to a suitable conclusion.

By Judge Wilson: Do you distinguish between articles sold in the original package and in the broken package? Counsel, I think, makes a point of that.

A. I may be confused on that particular point, because of the fact that no effort would be made by the Department unless it was a resale in intra-state commerce; within the State of Maine.

By Judge Wilson: That is a question of law.

Q. Suppose you had positive information that after January 1st, 1936, a drug store located in Portland, Maine, had brought into the State a number of original boxes of plaintiff's face powder—original sealed boxes—and that this drug store intended offering these original sealed boxes of face powder for sale to retail customers in Portland, Maine. Would the Department prosecute that drug store?

By Judge Wilson: I think that is a question of law.

Q. Is it the intention of the Department to prosecute that drug store, or any other drug store?

By Judge Wilson: That would be up to the Attorney General, wouldn't it?

By Mr. Blum: Well, this may being the head of the Department, he may have consulted him.

[fol. 256] Mr. Farris: He isn't the head of the Department. He is an employee of the Department.

Judge Wilson: Well, I don't think that is objectionable. He is apparently head of the department——

Mr. Farris: They have a health counsel to decide that under the advice of the Attorney General.

Mr. Blum: Well, if the Department has made up its mind at all I would like to have that in the record. The Act was passed last April and we brought our bill before the Act went into effect, and I want to know what the intention of the Department is. If it has no intention I would like to have that in the record.

Q. Has the Department made up its mind in the case which I have just mentioned?

A. I imagine in the case you have mentioned they wouldn't do anything. When the package was broken down and put on the shelves it would undoubtedly be the intention then to take proceedings.

Q. I asked you specifically about the original sealed package?

A. They wouldn't touch the original sealed package.

Q. You say——

A. I am not an attorney, but I should consider from my point of view the Department would consider that that was intrastate commerce until it was broken down and offered at retail; but that would be a matter of my opinion.

By Judge Wilson: You said intrastate. Did you mean interstate? I understood you to say intrastate.

A. In mean interstate. In the original package."

If the original sealed package were an ordinary box of face powder, the kind that the druggist hands to the customers when the customers want to make a purchase; and those packages were received by the druggist after January 1, 1936, and contained the plaintiff's unregistered face powder I think that would be referred to the Attorney General. We have to refer to the Attorney General for advice on those matters. We do it constantly. It is not a fact that the Department has asked all the out of state manufacturers or producers of cosmetic preparations to register. I think they have notified them that the law required regis- [fol. 257] tration if they were to be sold within the State.

Q. In other words, the Department has notified the plaintiff, and also the other concerns in a similar position, who are outside the State, that those concerns must register if they wish to have their products sold within the State?

A. I should think that was reasonably put. We have sent them a copy of the Statute and its terms."

[fol. 258] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO RECORD—Filed October 21, 1936

The parties having entered into a stipulation relative to the contents of the record on appeal, said stipulation being dated September 30, 1936 and having been filed in this Court on October 15, 1936, it is further Stipulated that for the purpose of the appeal which has been allowed herein to the Supreme Court of the United States, the Clerk of this Court is requested to prepare and forward to the Clerk of the Supreme Court of the United States a transcript of the record on appeal as provided for in said stipulation.

Verrill, Hale, Booth & Ives, Solicitors for Plaintiff.

Dated October 16, 1936.

Ralph W. Farris, Ass't. Atty. Gen., Solicitor for Defendants

Dated October 19, 1936.

[fol. 259] [File endorsement omitted.]

[fol. 260] IN UNITED STATES DISTRICT COURT

[Title omitted]

SUPPLEMENTAL STIPULATION AS TO RECORD—Filed November 4, 1936

It is hereby further stipulated that there be included in the transcript of the record on appeal

(1) The stipulation of the parties dated September 30, 1936.

(2) The stipulation of the parties filed October 21, 1936.

(3) The order of Court with respect to the evidence dated October 26, 1936.

(4) The stipulation filed October 30, 1936 amending the stipulation filed September 30, 1936.

(5) Notice given appellees by appellant under Rule 12 of the United States Supreme Court.
(6) Copy of the appeal bond.
(7) Copy of this stipulation.

Verrill, Hale, Booth & Ives, Attorneys for the Plaintiff. Ralph W. Farris, Attorney for the Defendants.

[fol. 261] [File endorsement omitted.]

[fol. 262] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER APPROVING STATEMENT OF EVIDENCE—Filed October 26, 1936

Pursuant to the stipulation of counsel, it is
Ordered as follows:

1. The annexed narrative statement of the testimony of John Bartholomew, Bernard M. Douglas, Elmer W. Campbell, Alfred P. Cook, Frank E. Deahna, Felix E. Guernier, Merrill A. Hay, Frederick W. Rugg, and Louis E. Weiner is hereby allowed and approved pursuant to Equity Rule No. 75(b) as being a true and complete statement of the evidence of said witnesses.

2. Pursuant to the request of plaintiff, it is directed that the testimony of Samuel N. Peck, J. Harper Blaisdell and part of the testimony of Elmer W. Campbell be reproduced in question and answer form and in the exact words of said witnesses and the annexed transcript of the testimony of said witnesses is hereby allowed and approved as being true and complete in all respects, and as conforming to said Equity Rule 75(b).

3. The annexed statement of the evidence is hereby allowed and approved as being a true and complete statement of all parts of the evidence which are essential to the questions presented by the appeal which has been filed by the plaintiff, and as conforming to said Equity Rule 75(b) and [fol. 262a] the same is hereby ordered filed as a statement of

the evidence to be included in the record on appeal in this cause, as provided in Equity Rule 75(b).

John A. Peters, U. S. District Judge.

26 Oct., 1936.

[fols. 263-265] [File endorsement omitted.]

[fols. 266-267] Bond on appeal for $500.00, approved and filed October 15, 1936, omitted in printing.

[fol. 268] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 269] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION AS TO PRINTING RECORD—Filed November 18, 1936

Pursuant to paragraph 9 of Rule No. 13 of this Court, the plaintiff-appellant states as follows:

1. Plaintiff-appellant herewith adopts the assignment of errors as the points upon which it intends to rely.

2. Plaintiff-appellant states that the entire record is necessary for consideration of the points upon which it intends to rely.

In amplification of the reference by plaintiff-appellant to the assignment of errors, plaintiff-appellant further states the points upon which it intends to rely as follows:

1. Since plaintiff-appellant is a New York corporation which sells its products to wholesalers and retailers located within the State of Maine wholly in interstate commerce, plaintiff has never done business in the State of Maine, [fol. 270] save through the channels of interstate commerce, and plaintiff has never owned any stock of its preparations which were warehoused or otherwise located within the State of Maine. The State of Maine therefore has no right to exact any fees or monies of any kind from the plaintiff

as a condition precedent to the sale of plaintiff's preparations in intrastate commerce within the State of Maine, by wholesalers and retailers who have purchased plaintiff's preparations in interstate commerce from plaintiff, and who are the sole and exclusive owners of the preparations put out by plaintiff and which are sold in intrastate commerce within the State of Maine, by said wholesalers and retailers.

The burden and expense of administering the statute in issue, including the taking of samples, can be imposed only upon said wholesalers and retailers and no taxes or fees can be required from plaintiff.

2. The statute in question is a registration statute and not an inspection statute because said statute does not provide for the actual inspection of merchandise, and said statute imposes a fixed fee per preparation, instead of imposing a fee based upon the quantity of each preparation which is sold or offered for sale in interstate commerce within the State of Maine. A state has no right to pass a registration statute which imposes a burden upon interstate commerce and more particularly upon the out-of-state manufacturer who sells wholly in interstate commerce to retailers or wholesalers located within the state.

[fol. 271] 3. The statute is unconstitutional because it provides for the grant or the denial of a certificate, wholly as the result of ex parte proceedings. The alleged right of appeal given to the plaintiff-appellant, in case an original certificate of registration is denied, in insufficient. Likewise the statute expressly provides that the renewal of a certificate can be denied, wholly as the result of ex parte proceedings, and without any right of review or other proceeding wherein the plaintiff-appellant would have the right to be represented and to take testimony.

4. The statute is unreasonable and unconstitutional because if there is any variation between a preparation for which a certificate of registration has been granted, and such preparation as actually sold within the State of Maine, the original certificate of registration will not protect the dealer. It is impossible to make toilet preparations with absolute uniformity, and the necessary manufacturing tolerances have no relation to the harmfulness or lack of harmfulness of the cosmetic preparation.

5. The statute is unconstitutional because it includes the regulation of wholly intrastate business by beauty parlors and the like, and no method of allocation has been adopted so as to allocate the expense for regulating the intrastate [fols. 272-273] business of beauty parlors and of cosmetic manufacturers located within the State of Maine, as distinguished from the cost of administering the statute with reference to cosmetic preparations made outside of the State of Maine and shipped to wholesalers or retailers within the State of Maine wholly in interstate commerce.

6. The peremptory search and seizure provisions of the statute are contrary to the Constitution of the United States of America and contrary to the Constitution of the State of Maine.

Verrill, Hale, Booth & Ives, Attorneys for the Plaintiff-Appellant. Asher Blum, of Counsel for the Plaintiff-Appellant.

[fol. 274] [File endorsement omitted.]

Endorsed on cover: File No. 41,074. Maine D. C. U. S. Term No. 534. Bourjois, Inc., appellant, vs. Clyde R. Chapman, George W. Leadbetter and George H. Coombs. Filed November 18, 1936. Term No. 534, O. T., 1936.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 534

BOURJOIS, INC.,

Appellant,

vs.

CLYDE R. CHAPMAN, GEORGE W. LEADBETTER AND GEORGE H. COOMBS.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MAINE.

STATEMENT AS TO JURISDICTION.

HARRY M. VERRILL,
ROBERT HALE,
CHARLES D. BOOTH,
Counsel for Appellant.

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UNITED STATES DISTRICT COURT, DISTRICT OF MAINE, SOUTHERN DIVISION

BOURJOIS, INC.,

Plaintiff-Appellant,

vs.

CLYDE R. CHAPMAN, GEORGE W. LEADBETTER AND GEORGE H. COOMBS,

Defendants-Appellees.

STATEMENT PURSUANT TO RULE No. 12 OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES.

This is an appeal by plaintiff from an order and final decree and judgment, denying an interlocutory judgment in favor of plaintiff to restrain the enforcement of Chapter 109 of the Public Laws of 1935 of the State of Maine, and finally dismissing the complaint. The decision was rendered by a District Court specially constituted under Sec. 266 of the Judicial Code (U. S. Code, Title 28, Sec. 380).

This action was brought against officers of the State of Maine, in order to restrain them from enforcing said Chapter 109, on the ground that it was in violation of the Constitution of the United States of America and the Constitution of the State of Maine.

A motion for interlocutory injunction was made by plaintiff-appellant upon due notice and said motion pressed to

determination before said specially constituted District Court. At the conclusion of the argument on said motion, it was stipulated that said court should render a final decree and judgment, in accordance with its decision on plaintiff's said motion.

All the facts were presented to said specially constituted District Court by depositions and by testimony taken in open court.

The statutory jurisdiction of this court is based on U. S. Code, Title 28, Sec. 380.

The statute in question is found in the Public Laws of 1935 of the State of Maine, p. 295.

Said Statute is as follows:

"An Act for the Regulation of Cosmetics.

SEC. 1. Registration of Cosmetics.—On and after January 1, 1936, no person, firm, corporation or co-partnership shall hold for sale, sell, offer for sale, in intra-state commerce, give away, deal in, within this state, supply or apply in the conduct of a beauty shop, barber shop, hairdressing establishment or similar establishment, any cosmetic preparation unless the said preparation has been registered with and a certificate of registration secured from the department of health and welfare.

SEC. 2. Department of health and welfare authorized to issue certificate of registration. The said department is hereby authorized to issue and shall issue a certificate of registration to the manufacturer, proprietor, or producer of any cosmetic preparation on the payment of an initial registration fee of 50¢ per preparation, which certificate shall be renewed annually on or before the first day of January in each succeeding year on the payment of a fee of 50¢.

The said department is authorized to regulate or to refuse the issuance of certificates of registration or to prohibit the sale of cosmetic preparations which in its

judgment contain injurious substances in such amounts as to be poisonous, injurious or detrimental to the person. Temporary certificates of registration may be issued by said department for any preparation pending investigation of the same.

The department is hereby authorized to make such regulations as may be necessary for carrying out the purpose of this act to safeguard the public health.

Fees received under the provisions of this act shall be used by said department for carrying out the purposes of this act.

From the refusal of said department to issue a certificate of registration for any cosmetic preparation appeal shall lie to the superior court in the County of Kennebec or any other county in the state from which the same was offered for registration.

SEC. 3. Definition.—'Cosmestic preparations' shall mean tonics, lotions, creams, powders, antiseptics, clays, bleaches, colors, dyes, or other substance used with or without mechanical or electrical apparatus to massage, cleanse, stimulate, manipulate, color, bleach, or otherwise to treat, improve or to beautify, the scalp, face, neck, shoulders, busts, arms, arm pits, hands, or to arrange, dress, curl, wave, cleanse, bleach, color or similarly treat the hair of any person, and shall include all shampoo preparations.

Provided, however, that household and toilet soaps shall not be held to be cosmetic preparations but shall be subject to the provisions of this act if such soaps are represented by the manufacturer or the producer thereof as a preparation for the treatment of disease.

SEC. 4. Permits issued under public laws, 1933, chapter 278.—Permits issued under chapter 278 of the public laws of 1933 shall be considered to be permits issued under this act and shall remain in effect until June 30, 1936 without further payment therefor and may be renewed at the renewal rate provided unless such preparations are prohibited by this act.

SEC. 5. Cosmetic preparations kept or deposited for unlawful sale or use in this state are liable to forfeiture.—Cosmetic preparations kept or deposited within the state intended for unlawful sale or use, and the vessels in which they are contained, are contraband and are subject to forfeiture to the state unless they have been registered with the said department as prescribed in the preceding sections. Sheriffs, deputy sheriffs, police officers, state police officers and duly authorized agents of the said department, shall have the power to seize the same with or without process. In cases where cosmetic preparations are seized without a warrant said preparations shall be kept in some safe place for a reasonable time until a warrant can be procured.

SEC. 6. Duty of officer or duly authorized agent of the said department.—When cosmetic preparations and vessels are seized as provided in the preceding sections the officer or duly authorized agent of the said department, who made such seizure shall immediately file with the magistrate before whom such warrant is returnable, a libel against such preparations and vessels, setting forth this seizure by him describing the cosmetic preparations, their vessels, and the place of seizure, and that they were kept or intended for unlawful sale and use in violation of law and pray for a decree of forfeiture thereof, and such magistrate shall fix a time for the hearing of such libel and shall issue his monition and notice of the same to all persons interested, citing them to appear at the time and place appointed to show cause why said preparations and vessels in which they are contained, should not be declared forfeited, by causing a true and attested copy of said libel and monition to be posted in two public and conspicuous places in the town or place where such preparations were seized, 10 days at least before said libel is returnable.

SEC. 7. Forfeiture is case no claimant appears; proceedings when claimant to be admitted as a party.—If no claimant appears, such magistrate shall, on proof

of notice as aforesaid, declare the same to be forfeited to the state. If any person appears and claims such preparations, or any part thereof, as having a right to the possession thereof at the time when the same were seized, he shall file with the magistrate such claim in writing, stating specifically the right so claimed, the foundation thereof, the items so claimed, the time and place of the seizure and the name of the officer or duly authorized agent of the said department by whom the same were seized, and in it declare that they were not so kept or deposited for unlawful sale and use, as alleged in said libel and monition, and also state his business and place of residence, and shall sign and make oath to the same before said magistrate. If any person so makes claim, he shall be admitted as a party to the process; and the magistrate shall proceed to determine the truth of the allegations in said claim and libel, and may hear any pertinent evidence offered by the libelant or claimant. If the magistrate is, upon hearing, satisfied that said preparations were not so kept or deposited for unlawful sale or use, and that the claimant is entitled to the custody of any part thereof, he shall give him an order in writing, directed to the officer or duly authorized agent of the said department having the same in custody, commanding him to deliver to said claimant the cosmetic preparation to which he is so found to be entitled, within 48 hours after demand. If the magistrate finds the claimant entitled to no part of said preparation he shall render judgment against him for the libelant for costs, to be taxed as in civil cases before such magistrate, and issue execution thereon, and shall declare said preparation forfeited to the state. The claimants may appeal and shall recognize with securities as on appeals in civil causes from a magistrate.

SEC. 8. Constitutionality.—If any section or part thereof, of this act, shall be declared unconstitutional it shall not affect the constitutionality of the remaining parts of this act.

SEC. 9. Exceptions.—Any preparation or preparations purchased prior to the effective date of this act shall not be subject to the provisions of this act, provided that satisfactory evidence is presented that purchase was made prior to the effective date of this act, and further provided that such preparation or preparations are not prohibited by this act because they contain ingredients that are poisonous, injurious or irritating.

SEC. 10. Penalty.—Any person, firm or corporation that violates any provision of the preceding sections, or any ordinance, or by-laws, or regulation made thereunder, shall be punished by a fine of not more than $100.

All fines, forfeitures and costs collected under this act shall be paid to the county as provided by chapter 148 of the revised statutes.

SEC. 11. Repeal.—Chapter 278 of the public laws of 1933 is hereby repealed.

The order and final decree and judgment sought to be reviewed was made and entered on the seventh (7th) day of October, 1936.

The date on which application for appeal was presented was October 15, 1936.

Nature of the Case and Statement of the Grounds Upon Which it is Contended that Substantial Questions are Involved.

Plaintiff is a New York corporation. It has been selling cosmetic preparations for forty years in interstate commerce to retailers and wholesalers located in Maine, and who resold said preparations in intrastate commerce. Plaintiff has also sold its cosmetic preparations in original packages, which were resold to the ultimate consumers. Said original packages were shipped to plaintiff's customers in

Maine, packed in shipping containers, each of which contained a plurality of said original packages.

Plaintiff has never had a place of business in Maine.

Chapter 109 requires that plaintiff register its preparations and pay fees for administering the statute, under penalty of having the sale of its preparations prohibited in intrastate commerce in Maine. The prohibition of such resale of plaintiff's preparations has stopped its business, in interstate commerce, with retailers and wholesalers in Maine.

Plaintiff contends that the State of Maine has no right to exact fees from plaintiff; that a fixed fee per preparation cannot be exacted; that the statute unlawfully commingles the expenses of administering the law relative to cosmetic preparations manufactured in Maine and sold there in interstate commerce, with the expenses of administering the law relative to cosmetic preparations manufactured outside of the State of Maine and sold in interstate commerce to retailers and wholesalers located in Maine; that the law provides for the refusal of an original certificate or the refusal of a renewal of a certificate wholly as the result of ex parte proceedings; that the search and seizure provisions of the statute are contrary to the Constitution of the United States of America and the Constitution of Maine; that the statute is not an inspection statute, because it does not provide for inspection of the merchandise.

The plaintiff pleaded and proved that the amount in controversy exceeded the sum of three thousand dollars, exclusive of interest and costs.

If the statute is constitutional, then any State can raise funds for enforcing a local health law, by exacting a fixed fee per preparation from manufacturers located outside of the State, irrespective of the amount of said preparation sold within the state.

The cases which are believed to show that the questions involved are substantial are as follows:

George H. Lee Co. v. *Webster*, 190 Fed. 353; *Vance* v. *W. A. Vandercook Co.*, 170 U. S. 438; *Rosenberger* v. *Pacific Express Company*, 241 U. S. 28; *Atlantic Refining Co.* v. *Trumbull*, 43 F. (2d) 154; *Stewart Dry Goods Co.* v. *Lewis*, 294 U. S. 550; *Noel* v. *The People*, 187 Ill. 587; *State* v. *Butler*, 105 Me. 91; *A. L. A. Schechter Poultry Corporation* v. *United States*, 295 U. S. 495; *Wichita Co.* v. *Public Utilities Commission*, 260 U. S. 48; *Cape Elizabeth* v. *Boyd*, 86 Me. 317; *Central Railway Co.* v. *Wright*, 207 U. S. 127; *Regal Drug Corporation* v. *Wardell*, 260 U. S. 386; *Chicago R. R. Co.* v. *State of Minnesota*, 134 U. S. 418; *United States* v. *McMurtry*, 48 F. (2d) 258; *Panama Refining Co.* v. *Ryan*, 293 U. S. 388; *Randall* v. *Patch*, 118 Me. 303; *Dunn* v. *Burleigh*, 62 Me. 24; *Cleveland Refining Co.* v. *Phipps*, 277 Fed. 463, aff. 261 U. S. 449; *Lugo* v. *Suazo*, 59 F. (2d) 386; *The Sarah*, 8 Wheaton 390; *The J. W. French*, 13 Fed. 916; *United States* v. *One Ford Sedan*, 297 Fed. 830.

The cases which are believed to sustain a direct appeal unto this court are as follows:

Jackson v. *Cravens*, 238 Fed. 117; *Pacific Telephone Co.* v. *Kuykendall*, 265 U. S. 196; *State Corporation Commission* v. *Wichita Gas Co.*, 290 U. S. 561; *Brucker* v. *Fisher*, 49 F. (2d) 759; *Interstate Busses Corporation* v. *Blodgett*, 276 U. S. 230; *Oklahoma Gas & Electric Co.* v. *Oklahoma Co.*, 292 U. S. 386.

Copies of the opinions of the court are appended.

Respectfully submitted,

VERRILL, HALE, BOOTH & IVES,
Solicitors for Plaintiff-Appellant.

HARRY M. VERRILL.
ROBERT HALE.
CHARLES D. BOOTH.

EXHIBIT "A".

Feb. 19, 1936.

In Equity.

BOURJOIS, INC., *Plaintiff*,

v.

CLYDE R. CHAPMAN, GEORGE W. LEADBETTER, GEORGE H. COOMBS, *Defendants*.

Per CURIAM:

This is a bill in equity seeking to enjoin the defendants from enforcing Chap. 109 of the Public Laws of 1935, entitled "An Act for the Registration of Cosmetics," which was heard before a statutory court of three judges under Sec. 380, Title 28, United States Code.

The hearing was on the plaintiff's motion for a temporary injunction on the ground that Sec. 1 of Chap. 109 of the Public Laws of 1935 was limited in its application to the conduct of beauty shops, barber shops, hair dressing establishments or similar establishments, but that the defendants threatened and intended to apply said law by regulating the holding for sale, the sale and the offering for sale in intrastate commerce within the State of Maine the cosmetic preparations by drug stores and department stores and by other stores or establishments which do not come within the scope of Sec. 1 of the Act, and such threat and intended action of the defendants is beyond the authority given to them under the Act.

That Sec. 1 of said Act is in conflict with Sec. VIII of the Constitution of the United States and of the Constitution of the State of Maine in that said section 1 prohibits any person or concern which was conducting a beauty shop, barber shop, hair dressing establishment or any similar establishment within the State of Maine on or after January 1, 1936, from applying the plaintiff's cosmetic preparations in the conduct of said beauty shop, barber shop, hair dressing establishment or other similar establishment,

even if a customer desiring the application of such cosmetic preparations has purchased the same subsequent to January 1, 1936, outside the State of Maine in the original sealed package put out by the plaintiff.

That said statute is contrary to the Constitution of the United States of America in that it attempts to regulate and prohibit the holding for sale, the sale and the offering for sale and the supplying or application within the State of Maine of cosmetic preparations which will be sold and shipped in interstate commerce in the original sealed packages to any of the concerns enumerated in Sec. 1 of the Act within said State.

That said statute is contrary to the Constitution of the United States and of the State of Maine in that it contains an unreasonable delegation of power and deprives the plaintiff of property without due process, inasmuch as it does not provide a hearing at which testimony may be taken, or require, in the event of an appeal from the ruling of the Department of Health and Welfare in case it refuses to issue or renew a certificate of registration, that a record of the proceedings before the Board shall be transmitted to the court so that it may be reviewed by the court; and that the statute does not provide for an effective right of review or appeal.

The provisions of the statute relating to hearings on appeal do not on their face deprive the plaintiff of due process of law, nor are penalties imposed for violation of the statute unreasonable or excessive.

We think the plaintiff has misinterpreted Section 1 of the Act in restricting it to the conduct of beauty shops, barber shops, hair dressing establishments or other similar establishments. The first part of the Act provides that no person, firm, corporation or co-partnership shall hold for sale, sell, offer for sale in intrastate commerce, give away or deal in within this state * * * any cosmetic preparation, unless the said preparation has been registered with and a certificate of registration is secured from the Department of Health and Welfare.

This, we think, is the proper construction of this section and expresses the intention of the legislature in enacting

this section, though a slightly different method of punctuation might have made it clearer.

The plaintiff stresses the interference with interstate commerce. The defendants in their brief insist it is not proposed by the state officials to interfere with interstate commerce; that they will only apply the law when cosmetics have entered into intrastate commerce.

Up to the time of the hearing no rules or regulations had been established by the Department of Health and Welfare, or any plan of putting the statute into operation. We think it is too early to anticipate that the state officials will undertake to interfere with interstate commerce when they insist that they have no such intention, and Sec. 1 of the Act merely prohibits holding for sale, the sale or offering for sale of cosmetic preparations in intrastate commerce.

The only section under which it can be urged that a burden is imposed on interstate commerce is Sec. 2, under which the Department of Health and Welfare is ordered to issue a certificate of registration to any manufacturer, proprietor or producer of cosmetic preparations on the payment of an initial registration fee of fifty cents per preparation, and to renew the same annually on the payment of the same fee.

The exercise of the police powers of the state to protect the inhabitants from injurious substances detrimental to their health is well recognized; Patapsco Guano Co. *v.* North Carolina, 171 U. S. 345, 354; Plumley *v.* Massachusetts, 155 U. S. 461; Savage *v.* Jones, 225 U. S. 501, 525, 527; McLean *v.* Denver & Rio Grande R. R. Co., 203 U. S. 38, 55; Tangera & Co. *v.* New York, 224 N. Y. 269.

Without further evidence of a purpose to interfere with interstate commerce, we think this court is not warranted in issuing a temporary injunction to prohibit action which may never take place so far as the plaintiff is concerned.

Much of the bill of the plaintiff relates to anticipated action on the part of the Department of Health and Welfare of the state, which may never take place, and the above grounds of objection as the basis for the issuing of

a temporary injunction, we think, are not sufficient to warrant the issuing of a temporary injunction at this time.

The fees received under the provisions of this Act are to be used by said Department for carrying out the purposes of the Act, which clearly are for investigation and examination of cosmetic preparations to determine whether they are injurious to the health.

The motion for a temporary injunction is denied, but if it later appears that interstate commerce is unduly interfered with or due process is denied to the plaintiff by any of the provisions of the Act, or regulations adopted thereunder, as enforced by the state officials, the plaintiff's motion for a temporary injunction may be renewed pending final hearing on the bill and answer, when additional evidence may be submitted as to any action of the state officials in enforcing the statute.

EXHIBIT "B".

BOURJOIS, INC.,

v.

CLYDE R. CHAPMAN ET ALS.

Per CURIAM:

The plaintiff, a citizen of the State of New York, brought its bill in equity to enjoin the Attorney General of Maine, and head of the Department of Health and Welfare of the State, and an employe of that department, defendants, the necessary jurisdictional facts being alleged, from enforcing Chapter 109 of the Public Laws of the State of Maine, which provides as follows:

"SEC. 1. Registration of cosmetics.—On and after January 1, 1936, no person, firm, corporation or copartnership shall hold for sale, sell, offer for sale, in intra-state commerce, give away, deal in, within this state, supply or apply in the conduct of a beauty shop, barber shop, hairdressing establishment or similar establishment, any cosmetic preparation unless the said preparation has been registered with and a certificate of registration secured from the department of health and welfare.

"SEC. 2. Department of health and welfare authorized to issue certificate of registration.—The said department is hereby authorized to issue and shall issue a certificate of registration to the manufacturer, proprietor, or producer of any cosmetic preparation on the payment of an initial registration fee of 50¢ per preparation, which certificate shall be renewed annually on or before the first day of January in each succeeding year on the payment of a fee of 50¢.

"The said department is authorized to regulate or to refuse the issuance of certificates of registration or to prohibit the sale of cosmetic preparations which in its judgment contain injurious substances in such amounts as to be poisonous, injurious or detrimental to the person. Tem-

porary certificates of registration may be issued by said department for any preparation pending investigation of the same.

"The department is hereby authorized to make such regulations as may be necessary for carrying out the purpose of this act to safeguard the public health.

"Fees received under the provisions of this act shall be used by said department for carrying out the purpose of this act.

"From the refusal of said department to issue a certificate of registration for any cosmetic preparation appeal shall lie to the superior court in the county of Kennebec or any other county in the state from which the same was offered for registration."

Sec. 3 defines what is meant by "cosmetic preparations." The remainder of the Act relates to its enforcement.

A hearing was had on a motion of the plaintiff for a temporary injunction on the third day of January, 1936, at which this court construed Sec. 1 of the Act and held that the plaintiff's bill was prematurely brought, since the state officials had taken no steps to enforce the Act, which went into effect on January 1, 1936, and denied any intent to interfere with interstate commerce.

Since that time the state officials have notified local dealers in cosmetics of the Act and their intent to enforce it, and while a large number of out of the state manufacturers of cosmetic preparations have complied with the provisions of Sec. 2, the plaintiff has refused to comply, and the state officials have made seizure in several stores where unregistered cosmetic preparations manufactured by the plaintiff, or by other out of the state manufacturers, were being offered for sale.

The plaintiff now brings its supplemental bill to enjoin the state officials from enforcing the Act so far as the cosmetic preparations manufactured by the plaintiff are concerned, which was answered by the defendant denying any interference with interstate commerce or intent so to do in the future, and contending that the provisions of the Act are a proper exercise of the police powers of the state.

A hearing was held on June 24, 1936, at which time answers to interrogatories by the defendants and additional testimony of witnesses were introduced and briefs have been filed. It was stipulated in open court by the parties that the hearing should be considered a final hearing on the original and supplemental bills and answers thereto and evidence, and that the case should be disposed of by a final decree at this time. It was also agreed that all the evidence introduced at the previous hearing and all pleadings previously filed may be considered by the court in so far as the same are pertinent to the issues presented.

The main points stressed by the plaintiff were that the bill violates Sec. 8 of Art. I, and also the Fourteenth Amendment of the federal Constitution, in that it imposes a burden on interstate commerce and deprives the plaintiff of property rights without due process.

The requirement that no person, firm, corporation or copartnership shall hold for sale, sell, offer for sale, supply or apply in the conduct of a beauty shop, barber shop, hairdressing establishment or similar establishment within the State of Maine, any cosmetic preparation unless the same shall be registered and a certificate of registration secured from the department of health and welfare, is expressly limited by the Act to intrastate commerce.

The plaintiff, however, contends that the requirement that every out of the state manufacturer or producer of cosmetic preparations who sells cosmetic preparations to retailers for sale in the State of Maine, shall register each preparation and pay an initial registration fee of 50¢ per preparation, is a burden on interstate commerce; that the plaintiff ships its products into the State in "original packages;" hence the requirement that each "preparation" shall be registered and a fee of 50¢ per preparation paid is a burden on interstate commerce; and that each separate package of cosmetics remains in interstate commerce until sold by the retailer.

Packages seized in local stores were introduced in evidence as exhibits, containing lip sticks, face powder, toilet creams, and other cosmetic preparations, all in separate and small packages, some of which were approximately 1½"

x ¾" x ½" in size, and which it was testified were shipped by the manufacturer from out of the state to the retailer in Maine in a shipping container or carton, from which they are removed by the retailer and placed on the shelves and counters of the local trade for sale, or are kept in their storerooms until needed in their retail department; the only exception being where some individual may have ordered a cosmetic preparation not carried by the retailer and a single package containing the article is shipped direct to the consumer, or to the retailer and delivered in the original container to the purchaser.

It is clear, we think, that the "original package" is the shipping container in which the cosmetic preparations are shipped into the state, and when they are removed therefrom and placed on the shelves or counters, or in the storerooms of the retailer they have become mingled with the mass of property in the state and are no longer in interstate commerce, and if unregistered in accordance with Sec. 2 of the Act, are subject to seizure and forfeiture.

This is amply borne out by the decisions. The law relating to original packages was first considered in Brown *v.* Maryland, 12 Wheat. 419, in which the State of Maryland required all importers of intoxicating liquors by wholesale hogshead, barrel or tierce to take out a license which the Supreme Court held was repugnant to that provision of the Constitution forbidding a levying of a duty on imports as well as that declaring that Congress should have the power to regulate commerce with foreign nations.

The following *dictum* in the opinion in that case by Chief Justice Marshall: "We suppose the principle laid down in this case to apply equally to importations from a sister state," was subsequently considered in Woodruff *v.* Parham, 8 Wall. 123, and the decision was held to have no application to commerce between the states and only applied to articles imported from a foreign country into the United States.

The principle laid down in Woodruff *v.* Parham was applied in Brown *v.* Huston, 114 U. S. 622, and in Pittsburgh & Southern Coal Co. *v.* Bates, 156 U. S. 577.

But in May *v.* New Orleans, 178 U. S. 496, which involved the validity of tax assessments on goods imported from a foreign country, the goods were shipped in large cases for importation, but were put up in smaller packages, a large number being enclosed in each box. On arrival the packages were taken out and sold unbroken. The Court said:

> "In our judgment the original package * * * was the box or case in which the goods imported were shipped, and when the box was opened for sale or delivery of the separate parcels contained in it, each parcel lost its distinctive character as an import and became property subject to taxation by the state as other like property situated within its limits."

The principles laid down in Austin *v.* Tennessee, 179 U. S. 343, are decisive of the case here. The Court said, page 359:

> "The whole theory of the exemption of the original package from the operation of state laws is based upon the idea that the property is imported in the ordinary form in which, from time to time immemorial, foreign goods have been brought into the country. These have gone at once into the hands of the wholesale dealers, who have been in the habit of breaking the packages and distributing their contents among the several retail dealers throughout the State. It was with reference to this method of doing business that the doctrine of the exemption of the original package grew up. But taking the words 'original package' in their literal sense, a number of so-called original package manufactories have been started through the country, whose business it is to manufacture goods for the express purpose of sending their products into other States in minute packages, that may at once go into the hands of the retail dealers and consumers, and thus bid defiance to the laws of the State against their importation and sale. In all the cases which have heretofore arisen in this court the packages were of such size as to exclude the idea that they were to go directly into

the hands of the consumer, or be used to evade the police regulations of the State with regard to the particular article."

Again, the Court said on page 360 of the above case:

"This court has repeatedly held that, so far from lending its authority to frauds upon the sanitary laws of the several States, we are bound to respect such laws and to aid in their enforcement, so far as can be done without infringing upon the constitutional rights of the parties. The consequences of our adoption of defendant's contention would be far-reaching and disastrous. For the purpose of aiding a manufacturer in evading the laws of a sister state, we should be compelled to recognize anything as an original package of beer from a hogshead to a vial; anything as a package of cigarettes from an importer's case to a single paper box of ten, or even a single cigarette, if imported separately and loosely; anything from a bale of merchandise to a single ribbon, provided only the dealer sees fit to purchase his stock outside the State and import it in minute quantities."

While the court's conclusion in this case was grounded on the opportunity for fraud upon the health laws of a state, the opportunity is just as great in connection with cosmetic preparations, if the contention of the plaintiff is sustained in this case.

The principles laid down in Austin *v.* Tennessee were adhered to in Cook *v.* Marshall County, 196 U. S. 261, 269, 270, and cited with approval in Kirmeyer *v.* State of Kansas, 236 U. S. 568, 573; McDermott *v.* State of Wisconsin, 228 U. S. 116, 135; Hebe Co. *v.* Shaw, 248 U. S. 297, 304.

In Cleveland Macaroni Co. *v.* State Board of Health, 256 Fed. 376, in which the plaintiff's contention was the same as that of the plaintiff here, viz: that the goods put up in separate packages were shipped in large shipping cases and taken out by the retailer and sold in the original packages in which they were put up, or the retailer removed them

from the cases in which they were shipped and placed them on the shelves for sale to the consumer, the Court said:

> "Ordinarily such disposition withdraws goods shipped into a state from the domain of interstate commerce, and makes them a part of the general body of local commerce, and subjects them to any reasonable regulations by the State," citing Austin *v.* Tennessee, *supra.* The Court further said:
>
> "It appears from the defendant's return on the order to show cause that the plaintiff's goods were shipped into the state in large containers or boxes, each containing a certain number of small packages or paper cartons, in quantities suitable for sale to the consumer, and that it is in this latter form they are sold by retailers."

In McDermott *v.* State of Wisconsin, *supra,* the Court said:

> "And where it has been found necessary to decide the boundary of Federal authority it has been generally held that, where goods prepared and packed for shipment in interstate commerce are transported in such commerce and delivered to the consignee and the package by him separated into its component parts, the power of Federal regulation has ceased and that of the State may be asserted," citing the cases of Austin *v.* Tennessee, and Cook *v.* Marshall County, *supra.*

Some of the state cases in which the doctrine of the above cases have been applied are: Commonwealth *v.* Schollenberger, 156 Penn. St. 201; Haley *v.* Nebraska, 42 Nebr. 556; McGregor *v.* Cone, 104 Iowa, 465, 471, 473; State *v.* Winters, 44 Kan. Sup. 723.

In Commonwealth *v.* Schollenberger, *supra,* the Court, in defining an original package, said:

> It is "such form and size of package as is used by producers or shippers for the purpose of securing both convenience in handling and security in transportation of merchandise between dealers in the ordinary course of actual commerce."

The exhibits introduced in evidence cannot be said to comply with this definition. Also see United States *v.* One Hundred and Thirty-two Packages, 76 Fed. 364, 368; Vol. 2, Bouvier's Law Dictionary under Title, "Original Packages."

Under the rule laid down in the above cases we think interstate commerce ends under the facts shown by the evidence in this case, as soon as the separate packages in which the cosmetic preparations of the plaintiff were put up for sale to the consumer have been taken from the shipping container in which they were shipped into Maine, and placed on the shelves or counters, or in the storerooms of the retailers, and they are then subject to state laws.

The other principal issue in the case is whether Chap. 109 of the Public Laws of 1935 by its requirement of registration by the manufacturer of all cosmetic preparations sold or offered for sale in this state is a violation of the Fourteenth Amendment to the Federal Constitution, or a valid exercise of the police powers of the State for the purpose of safeguarding the public health of its citizens.

A manufacturer is not obliged to ship goods into the State for sale here, but if such goods are shipped into Maine for the purpose of resale by local dealers, they must be registered or they are subject to forfeiture.

It is urged, however, that it is a mere registration law and is not within the police powers of the State, but imposes an undue burden on interstate commerce. Distinctions have been drawn between laws merely requiring the registration of products manufactured in one state and sold in a sister state, but which require no inspection, or where a sample of the article shipped into the State is required to be furnished by the shipper. Savage *v.* Jones, 225 U. S. 501; George H. Lee & Co. *v.* Webster, 190 Fed. 353. These cases, however, do not apply *in toto* to the statute under consideration. While the Act could have been drawn so that the intent of the legislature was more clearly defined, we think it obviously implies something more than mere registration of all cosmetic preparations by the manufacturer or producer, if intended for sale in this State by a retailer or jobber.

The intent of the legislature that something more than mere registration of cosmetic preparations is required is clearly indicated in Sec. 2 of the Act, whereby the Department of Health and Welfare "is authorized to refuse a certificate of registration, or to prohibit the sale of cosmetic preparations *which in its judgment* contain injurious substances in such amounts as to be poisonous, injurious or detrimental to the person;" and "Temporary certificates of registration may be issued by said department for any preparation *pending investigation of the same.*"

There can be no question that the purpose of the Act was to safeguard the public health, since the Health Department under Sec. 2 "is authorized to make such regulations as may be necessary for carrying out *the purpose of this Act to safeguard the public health.*"

That there must be proceedings by the Department of Health to determine whether any cosmetic preparations may be detrimental to the health of the users is self-evident. The manufacturer is not required to furnish samples of its preparations with a formula containing its ingredients; the Department of Health and Welfare perforce must go to places where cosmetic preparations are on sale in this State and purchase packages and analyze their contents to determine whether they contain any substance or substances in such amounts as to be injurious to the health of the person using such preparations. Evidence introduced before the court disclosed that certain cosmetic preparations have proven injurious to the users of the same.

It is well settled that in the exercise of its police powers a state may take such action, either by requiring proper labels, or by inspection, or by such proceedings as may be necessary to determine whether articles of food, fertilizers, any article advertised as of medicinal value, or any article to be applied to the face or body of the user for beautifying or medicinal purposes are injurious to the public health, even if incidentally interstate commerce may be affected. Savage *v.* Jones, *supra,* p. 525; Plumley *v.* Massachusetts, 155 U. S. 461; McDermott *v.* State of Wisconsin, *supra,* p. 131; Patapsco Guano Co. *v.* North Caro-

lina Board of Agriculture, 171 U. S. 345; Standard Stock Food Co. *v.* Wright, 225 U. S. 540, 549; Powell *v.* Pennsylvania, 127 U. S. 678, 683.

In Austin *v.* Tennessee, *supra*, p. 349, the Court laid down the rule that:

> "We have had repeated occasion to hold, where state legislation has been attacked as violative either of the power of Congress over interstate commerce, or of the Fourteenth Amendment to the Constitution, that, if the action of the state legislature were a *bona fide* exercise of its police power, and dictated by a genuine regard for the preservation of the public health or safety, such legislation would be respected, though it might interfere indirectly with interstate commerce."

And again on page 362:

> "The doctrine that the silence of Congress as to what property may be of right carried from one State to another means that every article of commerce may be carried into one State from another and there sold, ought not to be extended so as to embrace articles which may not unreasonably be deemed injurious in their use to the health of the people. If this be not so, it follows that the reserved power of the State to protect the health of its people, by reasonable regulation, has application only in respect of articles manufactured within its own limits, and that an open door exists for the introduction into the State, against its will, of all kinds of property which may be fairly regarded as injurious in their use to health. If Congress have power to declare what property may and what may not be brought into one State from another State, then the action of a State by which certain articles, not unreasonably deemed injurious to health, were excluded from its markets, should stand until Congress legislated upon the subject. If Congress possesses no such power, it is because the framers of the Constitution never intended that the mere grant of

> power to regulate commerce should override the power reserved by the States to pass laws that had substantial relations to the health of their people."

In the case of Powell *v.* Pennsylvania, *supra*, the court said, p. 683:

> "It is scarcely necessary to say that if this statute is a legitimate exercise of the police power of the State for the protection of the health of the people, and for the prevention of fraud, it is not inconsistent with that amendment (14th); for it is the settled doctrine of this Court that, as government is organized for the purpose, among others, of preserving the public health and the public morals, it cannot divest itself of the power to provide for those objects; and that the Fourteenth Amendment was not designed to interfere with the exercise of that power by the States. Mugler *v.* Kansas, 123 U. S. 663; Barbier *v.* Connolly, 113 U. S. 27."

It is urged that the fees collected of the registrants are not exclusively used for the inspection of cosmetic preparations and for carrying out the purpose of the Act; but the evidence fails to sustain any allegations of the plaintiff's bill and supplemental bills to this effect. This Court cannot assume such to be the fact, and so far as any evidence appears in the case it is to the contrary. The legislature in its wisdom has fixed this fee as necessary to cover the cost of inspection and enforcing the act. Without evidence clearly showing it to be excessive, this Court cannot declare this provision of the statute to be in violation of either the State or the Federal constitution.

Every presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a reasonable doubt. Sinking Fund Cases, 99 U. S. 700, 718.

The bills are dismissed with one bill of costs.

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FEB 19 1937
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

October Term, 1936

BOURJOIS, INC.,
Appellant,
vs.
CLYDE R. CHAPMAN, GEORGE W. LEADBETTER and GEORGE H. COOMBS,
Appellees.

No. 534

BRIEF FOR APPELLANT

ASHER BLUM,
HUGO MOCK,
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Supreme Court of the United States

October Term, 1936

BOURJOIS, INC., *Appellant,* vs. CLYDE R. CHAPMAN, GEORGE W. LEADBETTER and GEORGE H. COOMBS, *Appellees.*	No. 534

BRIEF FOR APPELLANT.

The opinions herein have not been reported. They are found in the Record, pages 41-54.

This is an appeal by the plaintiff, Bourjois, Inc., a New York corporation, from a final order and decree (R. pp. 59 and 60) of the United States District Court for the District of Maine, Southern Division, entered October 7, 1936, and denying an interlocutory injunction unto the plaintiff, and finally dismissing the complaint herein. The petition for appeal and the assignment of errors were filed on October 15th, 1936 (R. p. 60 and p. 62), and said appeal was duly allowed on October 20th, 1936 (R. p. 61).

The bill of complaint (R. pp. 3-15) was filed against Clyde R. Chapman, the Attorney General of the State of Maine, against George W. Leadbetter who is the Commissioner of Health and Welfare of the State of Maine and against George H. Coombs, who is the Director of Public Health of the State of Maine. Said defendants are citizens of the State of Maine. Said bill of complaint was filed in

order to secure a temporary injunction and a permanent injunction, restraining the defendants from enforcing a certain statute which went into effect on January 1st, 1936, and which is entitled "An Act for the Regulation of Cosmetics". A full copy of the statute is set forth in this brief (*infra*, p. 3).

A motion was made for an interlocutory injunction by the plaintiff, pursuant to Section 380 of Title 28 of the United States Code.

This motion was heard wholly upon testimony and depositions, and without the use of any affidavits. As appears from the final decree herein (R. pp. 59 and 60), it was duly stipulated that the order of the Court, on plaintiff's motion for interlocutory injunction, should also be the final order or decree in this cause.

It was duly pleaded in paragraph 3 of the complaint (R. pp. 4 and 5) that the matter in controversy exceeded, exclusive of interest and costs, the sum or value of three thousand dollars, and that there was diversity of citizenship between the parties, and that this suit arose under the Constitution of the United States of America, and under the Constitution of the State of Maine. These jurisdictional allegations were duly admitted in the answer (R. p. 16, par. 3).

Finding of Fact No. 8 (R. p. 55) and Conclusion of Law No. 1 (R. p. 58) duly state that the existence of the statutory amount in issue has been conceded in the pleadings, and that the plaintiff has offered sufficient proof to establish the existence of the statutory amount.

Plaintiff's place of business has always been located in New York for at least ten years, and it has always conducted its business in Maine, by selling to local dealers, in interstate commerce (Findings of Fact Nos. 11-14, R. pp. 55 and 56).

Statement of the Case.

The statute in question (Chapter 109 of the Public Laws of 1935 of the State of Maine) is as follows:

"STATE OF MAINE

CHAPTER 109

PUBLIC LAWS OF 1935

AN ACT for the Regulation of Cosmetics.

Sec. 1. Registration of cosmetics. On and after January 1, 1936, no person, firm, corporation or co-partnership shall hold for sale, sell, offer for sale, in intra-state commerce, give away, deal in, within this state, supply or apply in the conduct of a beauty shop, barber shop, hairdressing establishment or similar establishment, any cosmetic preparation unless the said preparation has been registered with and a certificate of registration secured from the department of health and welfare.

Sec. 2. Department of health and welfare authorized to issue certificate of registration. The said department is hereby authorized to issue and shall issue a certificate of registration to the manufacturer, proprietor, or producer of any cosmetic preparation on the payment of an initial registration fee of 50¢ per preparation, which certificate shall be renewed annually on or before the first day of January in each succeeding year on the payment of a fee of 50¢.

The said department is authorized to regulate or to refuse the issuance of certificates of registration or to prohibit the sale of cosmetic preparations which in its judgment contain injurious substances in such amounts as to be poisonous, injurious or detrimental to the person. Temporary certificates of registration may be issued by said department for any preparation pending investigation of the same.

The department is hereby authorized to make such regulations as may be necessary for carrying out the purpose of this act to safeguard the public health.

Fees received under the provisions of this act shall be used by said department for carrying out the purposes of this act.

From the refusal of said department to issue a certificate of registration for any cosmetic preparation appeal shall lie to the superior court in the county of Kennebec or any other county in the state from which the same was offered for registration.

Sec. 3. Definition. "Cosmetic preparations" shall mean tonics, lotions, creams, powders, antiseptics, clays, bleaches, colors, dyes, or other substance used with or without mechanical or electrical apparatus to massage, cleanse, stimulate, manipulate, color, bleach, or otherwise to treat, improve or to beautify, the scalp, face, neck, shoulders, busts, arms, arm pits, hands, or to arrange, dress, curl, wave, cleanse, bleach, color or similarly treat the hair of any person, and shall include all shampoo preparations.

Provided, however, that household and toilet soaps shall not be held to be cosmetic preparations but shall be subject to the provisions of this act if such soaps are represented by the manufacturer or the producer thereof as a preparation for the treatment of disease.

Sec. 4. Permits issued under public laws, 1933, chapter 278. Permits issued under chapter 278 of the public laws of 1933 shall be considered to be permits issued under this act and shall remain in effect until June 30, 1936, without further payment therefor and may be renewed at the renewal rate provided unless such preparations are prohibited by this act.

Sec. 5. Cosmetic preparations kept or deposited for unlawful sale or use in this state are liable to forfeiture. Cosmetic preparations kept or deposited within the state intended for unlawful sale or use,

and the vessels in which they are contained, are contraband and are subject to forfeiture to the state unless they have been registered with the said department as prescribed in the preceding sections. Sheriffs, deputy sheriffs, police officers, state police officers and duly authorized agents of the said department, shall have the power to seize the same with or without process. In cases where cosmetic preparations are seized without a warrant said preparations shall be kept in some safe place for a reasonable time until a warrant can be procured.

Sec. 6. Duty of officer or duly authorized agent of the said department. When cosmetic preparations and vessels are seized as provided in the preceding sections the officer or duly authorized agent of the said department, who made such seizure shall immediately file with the magistrate before whom such warrant is returnable, a libel against such preparations and vessels, setting forth this seizure by him describing the cosmetic preparations, their vessels, and the place of seizure, and that they were kept or intended for unlawful sale and use in violation of law and pray for a decree of forfeiture thereof, and such magistrate shall fix a time for the hearing of such libel and shall issue his monition and notice of the same to all persons interested, citing them to appear at the time and place appointed to show cause why said preparations and vessels in which they are contained, should not be declared forfeited, by causing a true and attested copy of said libel and monition to be posted in two public and conspicuous places in the town or place where such preparations were seized, 10 days at least before said libel is returnable.

Sec. 7. Forfeiture in case no claimant appears; proceedings when claimant to be admitted as a party. If no claimant appears, such magistrate shall, on proof of notice as aforesaid, declare the same to be forfeited to the state. If any person appears and

claims such preparations, or any part thereof, as having a right to the possession thereof at the time when the same were seized, he shall file with the magistrate such claim in writing, stating specifically the right so claimed, the foundation thereof, the items so claimed, the time and place of the seizure and the name of the officer or duly authorized agent of the said department by whom the same were seized, and in it declare that they were not so kept or deposited for unlawful sale and use, as alleged in said libel and monition, and also state his business and place of residence, and shall sign and make oath to the same before said magistrate. If any person so makes claim, he shall be admitted as a party to the process; and the magistrate shall proceed to determine the truth of the allegations in said claim and libel, and may hear any pertinent evidence offered by the libelant or claimant. If the magistrate is, upon hearing, satisfied that said preparations were not so kept or deposited for unlawful sale or use, and that the claimant is entitled to the custody of any part thereof, he shall give him an order in writing, directed to the officer or duly authorized agent of the said department having the same in custody, commanding him to deliver to said claimant the cosmetic preparation to which he is so found to be entitled, within 48 hours after demand. If the magistrate finds the claimant entitled to no part of said preparation he shall render judgment against him for the libelant for cost, to be taxed as in civil cases before such magistrate, and issue execution thereon, and shall declare said preparation forfeited to the state. The claimants may appeal and shall recognize with securities as on appeals in civil causes from a magistrate.

Sec. 8. Constitutionality. If any section or part thereof, of this act, shall be declared unconstitutional it shall not affect the constitutionality of the remaining parts of this act.

Sec. 9. Exceptions. Any preparation or preparations purchased prior to the effective date of this act shall not be subject to the provisions of this act, provided that satisfactory evidence is presented that purchase was made prior to the effective date of this act, and further provided that such preparation or preparations are not prohibited by this act because they contain ingredients that are poisonous, injurious or irritating.

Sec. 10. Penalty. Any person, firm or corporation that violates any provision of the preceding sections, or any ordinance, or by-law, or regulation made thereunder, shall be punished by a fine of not more than $100.

All fines, forfeitures and costs collected under this act shall be paid to the county as provided by chapter 148 of the revised statutes.

Sec. 11. Repeal. Chapter 278 of the public laws of 1933 is hereby repealed."

Statement of Proceedings.

The original bill of complaint (R. pp. 3-14) was filed on December 7th, 1935.

A motion for preliminary injunction was duly made, and this motion was denied in an opinion dated February 19th, 1936 (R. pp. 41-44), without prejudice (Finding of Fact No. 4, R. pp. 54 and 55).

Defendants then began to enforce the statute against plaintiff's preparations, by arresting local dealers and by making seizures.

Findings of Fact Nos. 9, 10, 16, 17, 21 (R. pp. 55 and 57), are as follows:

"9. Subsequent to January 1st, 1936, the defendants have enforced and have intended to enforce said Chapter 109 of the Public Laws of the State of

Maine by seizing cosmetic preparations put out by the plaintiff, and not registered in the State of Maine pursuant to said Chapter 109 and offered for sale in intrastate commerce within the State of Maine by dealers located within the State of Maine.

10. Subsequent to January 1st, 1936, the defendants have enforced and have intended to enforce said Chapter 109 of the Public Laws of the State of Maine, by arresting said dealers located within the State of Maine and engaged in intrastate commerce within the State of Maine, and who have sold in said intrastate commerce the cosmetic preparations of the plaintiff, which have not been registered pursuant to said Chapter 109.

16. Since the plaintiff has refused to register its cosmetic preparations under said Chapter 109, many wholesalers and retailers who have their places of business located within the State of Maine and who are engaged in selling cosmetic preparations in intrastate commerce within the State of Maine, have refused to order plaintiff's unregistered cosmetic preparations for sale in intrastate commerce within the State of Maine.

17. Unless it registers its cosmetic preparations, the enforcement of said Chapter 109 will put to an end a business which the plaintiff and its predecessors have conducted with wholesalers and retailers in the State of Maine for at least forty years.

21. Said Department of Health and Welfare notified plaintiff that it must register under said Chapter 109 if it wished to have its cosmetic preparations sold within the State of Maine."

Attention is called in particular to Finding of Fact No. 21, in which it is stated that the defendants notified the plaintiff itself, as distinguished from any of the dealers handling plaintiff's preparations within the State of Maine

in intrastate commerce, to register and to pay the fees required by the statute.

These findings were not objected to by the defendants, and they are amply supported by the interrogatories and the answers thereto (R. pp. 30-41), and by the evidence (R. pp. 81-96; p. 170, fol. 257; p. 73, fol. 130).

Assignment of Errors.

1. The Court erred in denying an interlocutory injunction and a permanent injunction suspending or restraining the enforcement, operation or execution of Chapter 109 of the Public Laws of 1935 of the State of Maine.

2. The Court erred in holding that said Chapter 109 was not in violation of the Constitution of the United States of America.

3. The Court erred in holding that said Chapter 109 of the Public Laws of 1935 was not in violation of the Constitution of the State of Maine.

4. The Court erred in holding that said Chapter 109 was an inspection law.

5. The Court erred in holding that the State of Maine could compel the plaintiff to apply for a certificate or certificates of registration under said Chapter 109.

6. The Court erred in holding that the State of Maine could compel the plaintiff to pay the fee specified in said Chapter 109 for securing a certificate of registration or the renewal thereof.

7. The Court erred in holding that the State of Maine had any power to compel the plaintiff to pay any fee or fees to be used by the Department of Health and Welfare of the

State of Maine for carrying out the purposes of said Chapter 109.

8. The Court erred in holding that the State of Maine had the authority to compel the plaintiff to do anything or to make any payment as a condition precedent to the sale of plaintiff's products in intrastate commerce in the State of Maine.

9. The Court erred in not holding that the fees specified in said Chapter 109 could be exacted only from the vendor of the cosmetic preparations specified in said Chapter 109, who was selling said cosmetic preparations in intrastate commerce in the State of Maine, or from the person who was holding the same for sale, or was offering the same for sale, in said intrastate commerce.

10. The Court erred in not holding that said Chapter 109 was a registration law, as distinguished from an inspection law.

11. The Court erred in holding that the State of Maine could require a fixed payment per cosmetic preparation from the plaintiff or any other person in order to secure a certificate of registration under said Chapter 109, or a renewal of said certificate.

12. The Court erred in not holding that said Chapter 109 was an unlawful and unconstitutional burden on interstate commerce between the several states of the United States of America.

13. The Court erred in holding that the "original package" doctrine did not extend to the instant case.

14. The Court erred in not holding that the State of Maine must install an accounting system so as to separate the expenses required in administering said Chapter 109

with reference to cosmetic preparations produced outside of the State of Maine and shipped in interstate commerce to and within the State of Maine, from the expenses required in administering said Chapter 109 with reference to cosmetic preparations produced within the State of Maine and sold within the said state in intrastate commerce, and without ever having been shipped outside of the State of Maine.

15. The Court erred in not holding that the State of Maine must install an accounting system so as to separate the expenses required in administering said Chapter 109 relative to beauty shops, barber shops, hair dressing establishments or similar establishments located within the State of Maine, as distinguished from the expense of administering said Chapter 109 relative to cosmetic preparations manufactured outside of the State of Maine and shipped to the State of Maine in interstate commerce.

16. The Court erred in holding that the plaintiff had to offer any evidence in order to show that the fees fixed by said Chapter 109 were excessive.

17. The Court erred in not holding that the search and seizure provisions of said Chapter 109 were contrary to the Constitution of the United States of America and contrary to the Constitution of the State of Maine.

18. The Court erred in not holding that said Chapter 109 was contrary to the Constitution of the United States of America and of the State of Maine, in that said Chapter 109 provides for the denial of a certificate of registration wholly as the result of *ex parte* proceedings.

19. The Court erred in not holding that said Chapter 109 was contrary to the Constitution of the United States and the Constitution of the State of Maine in that said Chapter 109 provides for the denial of the renewal of a

certificate of registration, wholly as the result of *ex parte* proceedings and without the right of review.

20. The Court erred in not holding that said Chapter 109 was contrary to the Constitution of the United States of America and the Constitution of the State of Maine in that said statute is discriminatory because it does not require the registration of household soaps and toilet soaps, unless such soaps were represented by the manufacturer or producer thereof as a preparation for the treatment of disease.

Summary of Argument.

It is conceded that a state has the power to prohibit the sale in intrastate commerce of foods and drugs which are a menace to public health. If the State of Maine had passed a statute prohibiting the sale of cosmetics which were poisonous or adulterated, according to standards specified in the statute itself, and without exacting any fees from out-of-state manfacturers who sold their products only in interstate commerce to dealers located within the State of Maine, an entirely different question would be presented.

Likewise, it is well settled that a state may pass a proper inspection statute, prescribing certain general standards of safety or purity in the statute, and to inspect the merchandise which arrives within the state for purposes of resale in intrastate commerce, in order to determine whether the merchandise conforms to the statutory standard, and to collect a reasonable inspection fee for this purpose from the dealer who offers the merchandise for sale within the state (*Savage* v. *Jones*, 225 U. S. 501). Such right of the state to pass an *inspection statute*, and the right to exact a fee in order to defray the expenses of inspection,

have been held to be based upon Article I, Sec. 10, Clause 2, of the Constitution of the United States of America (*infra*, pp. 33-35).

The Constitution expressly provides that the expense of executing a state insection law shall be defrayed by taxes in the nature of *imposts* or *duties* (*infra*, p. 32).

This means that an inspection fee must be charged, based wholly upon the quantity of merchandise to be inspected, as distinguished from a fixed fee, to be paid in advance, for each trade-mark which is affixed to the merchandise by the out-of-state manufacturer.

The inspection fee must be collected wholly from the dealer who sells the merchandise within the state, and not from the out-of-state manufacturer who sells to the dealer only in interstate commerce, so that the merchandise is the property of the dealer when it arrives within the state. Let us assume that plaintiff insisted that dealers in Maine should call for their purchase at plaintiff's place of business in New York, so that physical delivery was made in New York to the dealer's truck. Even then, plaintiff would be compelled to pay for the cost of registering the merchandise in Maine, if it wished to have its merchandise sold within the State of Maine.

The statute in question is therefore a registration statute and not an inspection statute. It is an absolute delegation of the legislative power to the Department of Health and Welfare, leaving to "*its judgment*" (Sec. 2 of the statute, *supra*, p. 3) the right to deny certificates of registration for cosmetic preparations.

The inspectors do not have the right to visit the premises of dealers in order to take samples of cosmetics, and to have said samples analyzed for purposes of comparison

with a statutory standard, as provided in all inspection laws which had been sustained (*Savage* v. *Jones*, 225 U. S. 501).

On the contrary, the inspector must go to the place of business of a dealer like any customer, and buy samples of cosmetics at the full price of the dealer, thus paying a profit to the dealer. This sample is then compared with the certificate of registration and any variation between the sample and the certificate of registration forthwith subjects the dealer to the forfeiture of his merchandise and to fine and imprisonment. It is impossible for the dealer to defend himself by showing that the merchandise is absolutely pure and harmless. The out-of-state manufacturer, who sells to dealers outside of Maine, must pay a registration fee, so that the dealer can profit by selling to the inspector.

The statute is therefore not an inspection statute, of the type permitted by the Constitution of the United States, as interpreted by all previous decisions. Likewise the statute in question gives to the Department, which is a branch of the Executive, absolute and capricious *ex parte* authority to deny a certificate, to deny the renewal of a certificate, or to prohibit the sale of merchandise during the term of a certificate, without granting any hearing and without right of review.

The statute is also unconstitutional because it provides for seizure and forfeiture of merchandise, without trial by jury.

It also imposes a uniformity of manufacture which is commercially impossible and which is not necessary to protect the public.

In all of the above points, the statute violates the Constitution of the United States of America and of the State of Maine.

The authorities cited by the District Court (R. pp. 44-54) relate wholly to the right of a state to exercise its police power by forbidding the sale of merchandise which does not comply with definite statutory requirements.

Likewise the record shows that the fees which the state has attempted to exact from the plaintiff, and from other out-of-state manufacturers who do no business whatever in intrastate commerce in the State of Maine, have been applied by the state for enforcing local statutes other than the statute in issue. The state has not established any regulations or any system of accounting whereby it can be ascertained whether the fees are reasonable, and whether such fees have been and will be devoted wholly to executing the statute in issue.

It is well settled that even where a state has the right to pass a proper inspection law, the state must install a system of accounting, whereby the persons who pay the inspection fee can determine whether or not the inspection fees are in excess of the amount necessary for reasonable enforcement of the inspection law. If a state does not establish such a system of accounting, the burden is upon the state to prove that the inspection fees are reasonable, and that such fees are devoted wholly to executing the inspection statute.

In the absence of the installation of such an accounting system by the state, the presumption is that the fees are unreasonable and in excess of the constitutional right of the state.

Plaintiff has the right to object to a statute which will prevent the continuance of its business with its dealers, even if the state exerts its authority wholly upon the intrastate business of said dealers (*Savage* v. *Jones*, 225 U. S. 501; *George H. Lee Co.* v. *Webster*, 190 Fed. 353).

ARGUMENT.

Analysis of the Statute.

Section 1 applies to cosmetics manufactured within the state by persons who conduct beauty shops, barber shops, hairdressing establishments or the like, and who make up their own tonics or face-creams or the like.

The act is expressly limited to persons who conduct,

> "a beauty shop, barber shop, hairdressing establishment or similar establishment",

where a personal service is rendered, as distinguished from a mere dealer. It cannot apply to plaintiff.

As later pointed out herein, no attempt has been made to segregate the expense of inspecting merchandise manufactured and sold wholly within the state, from merchandise manufactured outside of the state and sold to local dealers in interstate commerce.

Section 2 of the statute gives the Department of Health and Welfare the authority to issue a certificate of registration for each cosmetic preparation, on the payment of an initial registration fee of 50¢ per preparation. Each certificate for each preparation must be renewed annually upon the payment of an additional fee of 50¢ per preparation.

Section 3 of the statute does not include *perfumes*. Nevertheless if two face powers are identical in composition, save that they contain different perfumes, a separate certificate of registration is required (opinion of the Attorney General, R. p. 39, fol. 73).

Likewise under this opinion, if two face powders are identical in composition, save that they contain different amounts of the same coloring matter, the face powder which contains the lesser proportion of coloring matter must be separately registered, even though it cannot possibly be

more injurious than the preparation which contains the greater proportion of coloring matter.

The first paragraph of Section 2 provides that the certificate of registration shall be issued to and the fees shall be paid by "the manufacturer, proprietor, or producer of any cosmetic preparation". The defendants have construed this statute by demanding that the plaintiff file application for the certificate and pay the fees required by the law (Finding of Fact No. 21, R. p. 57; R. p. 170, fol. 257), although it never sells its products, or offers them for sale, within the state.

Irrespective of the practical construction of the statute by the defendants, they had no discretion in the matter because since plaintiff manufactured its own preparations, then, if the statute applied to plaintiff, the statute required that plaintiff (and no other person) must file application for the certificates of registration and pay the statutory fee. The word "proprietor" which is found in the first paragraph of Section 2 of the statute was intended to refer to concerns which applied their own trade-marks, to preparations manufactured for such concerns by commercial laboratories.

The statute uses the word "proprietor" in the *singular* form.

Only a single fee is required by the Maine law for each registration. The evidence disclosed that there were many druggists and other retailers located within the State of Maine, who have sold plaintiff's preparations in intrastate commerce, and no single retailer could be the "proprietor" within the meaning of the statute.

The word "proprietor" was taken from the copyright and trade-mark statutes in which said word is used to designate the exclusive owner of the copyright or trade-mark (*Yuengling* v. *Schile*, 12 Fed. 97 on p. 105).

In Black's Law Dictionary (1910), page 958, the word "proprietor" is defined in part as follows:

> "A person entitled to a trade-mark or a design under the acts for the registration of trade-marks and designs is called 'proprietor' of the trade-mark or design."

The second paragraph of Section 2 gives the Department unlimited and arbitrary and capricious *ex parte* power to deny a certificate of registration. No provision is made for a hearing or for the taking of testimony.

If the Department believes that a certain face powder is injurious, it may deny a certificate without a hearing, even though this is contrary to unanimous medical opinion. The applicant for registration cannot even take testimony before the Department to prove that the *ex parte* analysis made by the Department is erroneous.

The Department is not even required to notify the applicant of the reason for rejecting an application for registration.

The record shows how important it is to provide for a hearing and the taking of testimony.

While no criticism of any kind has been made of the products of the plaintiff, Dr. Campbell, who is an official of the State of Maine, testified that certain cosmetics made by manufacturers other than the plaintiff were injurious, because such cosmetics contained arsenic and other objectionable ingredients (R. p. 133, fol. 211).

Upon cross-examination it appeared that Dr. Campbell had referred to a hair tonic which contained arsenic trioxide in the proportion of five thousandths of one per cent. (R. p. 137, fol. 216, last question and answer).

Upon further cross-examination, Dr. Campbell conceded that he could not refer to a single textbook or authority which stated that this minute percentage of arsenic trioxide

would be injurious in a hair tonic (R. p. 138, last question and answer).

It then appeared that under the rulings of the Department of Agriculture, it was permissible to sell a *food* which contained five thousandths of one per cent. of arsenic trioxide (R. p. 140, fol. 219, first question).

Mr. Fuller (plaintiff's expert) then testified without contradiction that commercial glycerin contained as much as five thousandths of one per cent. of arsenic trioxide and that this minute percentage of arsenic trioxide did not make the glycerin objectionable for external use (R. p. 150, fol. 231).

These facts show how important it is to have the right to a hearing, instead of an *ex parte* analysis. The analysis of cosmetic preparations is very difficult and uncertain (R. pp. 112-114).

It is recognized that a state may organize a quasi-judicial body to operate under certain statutory standards, but in all legislation of this type which has been upheld, it has been necessary to provide for a full *hearing* before the quasi-judicial body (*infra*, p. 40). This safeguard is wholly omitted in the Maine statute.

The failure of the statute to provide for a hearing is particularly objectionable, because the second paragraph of Section 2 of the statute gives the Department the right to refuse to issue certificates or to prohibit the sale of preparations,

> "which *in its judgment* contain injurious substances in such amounts as to be poisonous, injurious or detrimental to the person."

As pointed out in *State* v. *Burdage*, 95 Wisc. 390, the words "in its judgment" grant unto the Department,

> "an absolute delegation of the legislative power."

The Department even has the right to grant a certificate to one manufacturer for a certain face powder or the like, and to deny a certificate to a competitor for a product having the identical formula.

If application for registration is filed, the Department can consider such application *ex parte* for any period of time it desires, up to one hundred years and even more, even though the preparation may be a dusting powder identical in formula with that used in hospitals and specified in the Pharmacopoeia. Even if application for registration for the same formula has heretofore been granted to one concern, the Department can hold up the registration of a later applicant for an indefinite period of time.

The last paragraph of Section 2 of the statute provides that an appeal may be taken from the refusal of the Department to issue an *original* certificate. Since the statute does not provide for the taking of testimony or for proceedings in any form before the Department, the appeal would necessarily be futile.

Likewise since the Department can grant or deny certificates according to *"its judgment"*, there could not possibly be an appeal on an issue of fact. The only question on appeal could be as to whether or not the Department had exercised "its judgment". Even if there were a total lack of evidence to sustain the ruling of the Department, no appeal could be taken on any question of fact.

Certain statutes, such as the statute which has created the Federal Trade Commission (U. S. Code, Title 15, sections 41-51), have provided that the finding of the quasi-judicial body on an issue of fact shall be final, subject to judicial review, *if supported by testimony*. For example U. S. Code, Title 15, sec. 45 provides:

> "The findings of the commission as to facts, if supported by testimony, shall be conclusive."

The Maine statute goes far beyond any previous law of this type, because instead of specifying any standards, or requiring a hearing, the entire matter has been delegated to the *ex parte* judgment of the Department. Likewise Section 2 does not provide for a hearing or for any appeal, if the Department refuses to *renew* a certificate. The renewal of a certificate can be refused upon the last day of the term of the original certificate, wholly as the result of *ex parte* proceedings, and even without prior notice to the manufacturer, or to the retailers who are handling the merchandise in question within the State of Maine.

As soon as the renewal of the certificate is refused, the further sale of the merchandise becomes unlawful. The statute does not provide for any period of time for disposing of merchandise whose sale has previously been authorized by the grant of an original certificate, even though the *ex parte* refusal to renew the certificate may be capricious and contrary to unanimous medical opinion.

If the chemist of the Department makes a new *ex parte* analysis of a face powder for which an original certificate has been issued, and on such new analysis the chemist erroneously determines that he has discovered some injurious substance which was not discovered upon the original analysis, a renewal can be refused *ex parte*, even though the new analysis of the chemist may be wholly erroneous.

The Department is not even required to state its grounds for refusing an original certificate or for refusing to renew an original certificate.

Likewise the second paragraph of Section 2 gives the Department the right,

> "to *prohibit* the sale of cosmetic preparations which *in its judgment* contain injurious substances * * *."

Hence, even after the Department has granted an original certificate, and during the term of the original certificate, the Department can change its mind and prohibit the sale of the registered cosmetic. This prohibition can also be the result of capricious *ex parte* proceedings, without advance notice, and without giving the plaintiff an opportunity to fill orders on hand and without giving the retailers an opportunity to sell merchandise on hand, for which an original or renewal certificate has been granted.

No appeal is provided if the Department issues an *ex parte* prohibition against the sale of a cosmetic preparation during the term of an original certificate, or during the term of a renewal certificate.

Section 3 of the statute defines cosmetic preparations and by failing to include perfumes, it expressly excludes perfumes from the scope of the statute.

Nevertheless, the opinion of the Hon. Attorney General (R. p. 39, fol. 73) requires separate registrations and the payment of additional fees for cosmetic preparations of identical composition, if one is perfumed and the other is unperfumed, or if said identical preparations contain different perfumes.

The testimony shows *without contradiction* that perfumes cannot be harmful.

Mr. Bartholomew, a person of long experience, testified (R. p. 67),

> "I have never heard of a perfume being harmful in any manner whatsoever * * * I should say the perfumes are absolutely harmless and I think that I might say that could be a general statement as applied to perfumes."

The opinion of the Hon. Attorney General (R. pp. 39 and 40) also requires different registrations, if two prepara-

tions of identical composition have any difference whatever in color, or if the same preparation is sold under different trade-marks.

The absolute uniformity of manufacture which is required (R. p. 40), is an impossible requirement, because the testimony shows without contradiction that it is impossible to make one batch the same in color or in composition as another batch which is intended to be made according to the identical formula. Likewise there can be changes in coloring matter without the slightest possibility of irritation.

On page 68 of the record Mr. Bartholomew testified as follows:

> "The coloring matters used in the face powders would be insoluble pigments as well as some soluble colors, or you might say harmless soluble colors. In this connection the color percentages may range from 1 in 100,000 to 1 in 5,000,000, making a possibility of irritation impossible."

According to the ruling of the Hon. Attorney General, the Department may hold that a face powder which contains coloring matter in the proportion of one part of coloring matter to one hundred thousand parts of face powder is absolutely harmless. If so, the use of the same coloring matter in an even smaller proportion, such as one part of coloring matter to five million parts of face powder, must be necessarily even less harmful. Nevertheless, each and every variation in percentage of coloring matter requires a separate registration. It would be necessary to register every batch.

Mr. Fuller, an expert witness of long experience, testified without contradiction that it was impossible to make a face powder of absolute uniformity and that the variations would

necessarily run to two-tenths per cent. Such variation is within the limits permitted by the United States Pharmacopoeia (R. pp. 109 and 110, fols. 180 and 181).

Section 3 of the statute includes soaps, and the Hon. Attorney General has ruled that shaving soaps, for example, come within the statute (R. p. 40, fol. 75).

The expert testimony shows without contradiction that if soap is made according to the same formula, the batch of soap differs in composition throughout its mass, so that if a batch of soap is boiled in a kettle, the cakes of soap which are made from different parts of the same batch from the same kettle, will vary in composition by much more than one-tenth of one percent (R. p. 110, fols. 181 and 182).

Hence the statute is so severe as to be absolutely unworkable. If a certificate of registration is granted for a face powder, and the analysis of a sample which is secured from a retailer, shows a difference in percentage of coloring ingredient or of other ingredient from those specified in the original registration, no matter how minute and immaterial the variation may be, the retailer is subjected forthwith to the severe penalties prescribed by the statute, without the slightest opportunity of making a defense.

Sections 5-7 of the statute permit search and seizure without trial by jury.

Section 10 of the statute makes it a penal offense to violate any by-law or regulation of the Department, so that the legislature has in effect delegated to the Department the right to enact penal statutes.

The statute is not an *inspection* statute. It is a *registration* statute. The sole duty of the state officers is to prevent the sale of unregistered preparations. No general standard of purity or harmlessness is specified in the statute. In these respects, the Maine law is entirely different from the inspection laws which have been sustained.

The State of Maine cannot compel plaintiff to pay the costs of administering a local law. In particular it cannot compel plaintiff to pay for the cost of buying samples at retail, including a profit to the retailer.

Obviously, the State of Maine cannot tax the plaintiff, which is a New York corporation, and which does not sell anything in intrastate commerce in Maine. If the State of Maine would require the payment of any general tax by the plaintiff, as a condition precedent for the sale of plaintiff's products in intrastate commerce in the State of Maine, this would clearly be beyond the authority of the state. It is absurd to say that no interference with interstate commerce is committed, if the sale of plaintiff's products is prohibited in intrastate commerce. For forty years plaintiff has done a substantial business in the State of Maine, by selling its products only to retailers and wholesalers located within the State of Maine, for purposes of resale in intrastate commerce. Plaintiff has never done a direct mail order business with residents of Maine. If plaintiff's business with dealers is prohibited, and plaintiff is limited to a direct mail order business with individual residents of Maine, plaintiff's business is destroyed.

The test is stated in,

East Ohio Gas Co. v. *Tax Commission of Ohio*, 283 U. S. 465,

in which it was stated (p. 470):

> "It is elementary that a state can neither lay a tax on the act of engaging in interstate commerce nor on gross receipts therefrom. * * * it must appear that one engaged exclusively in interstate business would not be subject to the imposition, and that the taxpayer could discontinue the intrastate business without withdrawing also from the interstate business."

If the statute in issue is sustained, then a state could collect a tax from a company engaged in selling gas wholly in interstate commerce, by forbidding the use or sale of the gas within the state, unless a tax were paid by the out-of-state concern.

It does not make any difference that the tax which is sought to be collected from the plaintiff herein, may be devoted to a worthy purpose. If the State of Maine wishes to protect its citizens by a suitable health law, it must collect the expenses of administering the statute from its own dealers and citizens. In particular, it must take samples for the purposes of inspection from the dealers engaged in intrastate commerce within the state, and who own the merchandise, at the expense of said dealers. It is particularly objectionable to demand money from the plaintiff for the purpose of buying samples at full retail price from local dealers, thus giving the local dealer a profit at the expense of the plaintiff. There is nothing which people bear with such great fortitude as the taxes and the troubles of other people. The retailers within the State of Maine will welcome the visits of the inspectors, because every purchase of plaintiff's preparations will mean a profit to the retailer, and plaintiff will pay this profit.

A case exactly in point is found in,

George H. Lee Co. v. *Webster*, 190 Fed. 353.

This case involved a statute of Kansas, which required that each and every brand of concentrated feeding stuff should be registered, together with a statement of its ingredients. A fixed fee was charged for each brand registration. It was held that this was not an inspection law,

> "but is merely a fee exacted of complainant for registering the brand of goods offered by him. • • •

> the registration fee required by section 2 of the Act, insofar as complainant is concerned, is a tax on his right to engage in the business of selling his product to his customers in this state, and is therefore unconstitutional and void."

As in the instant case, the plaintiff, George H. Lee Co. was not a citizen of the state which had passed the so-called inspection law and said plaintiff sold its products to various dealers in the State of Kansas, in interstate commerce, and said dealers resold the same in intrastate commerce.

On page 355 of 190 Fed. the Court stated as follows:

> "It is evident, however, complainant has the right on compliance with all lawful demands of the state to bring his products within the state, and to there dispose of them to his customers without let or hindrance from the state, or its authorized agents, either through exactions made directly upon complainant in reference to such interstate business, or by interference with such business by the state indirectly through complainant's customers, to his injury and the detriment of such business. In Brown v. Maryland, 12 Wheat, 419, 6 L. Ed. 678, Mr. Justice Marshall, delivering the opinion said:
>
> > 'A tax on the occupation of an importer is, in like manner, a tax on importation. It must add to the price of the article, and be paid by the consumer, or by the importer himself, in like manner as a direct duty on the article itself would be made. This the state has not a right to do, because it is prohibited by the Constitution'."

In the case of,

> *Rosenberger* v. *Pacific Express Company,* 241 U. S. 48,

this Court invalidated a Texas statute which imposed,

> "a state license tax of $5000.00 annually on each place of business or agency of every express company where intoxicating liquors were delivered."

Even though the tax was not imposed upon the shipper, this Court held that such fixed fee was a burden on interstate commerce.

In statutes which have been sustained, as evidenced by the case of *Savage* v. *Jones*, the fee has always been based upon the amount of merchandise which was brought within the state, and which was sold or offered for sale within the state. Since the cost of inspection depends upon the amount of merchandise sold by dealers located within the state, it is unfair and unconstitutional to compel a manufacturer whose sales within the state are relatively small, to pay the same fee per preparation as another manufacturer whose sales per preparation may be very large. For example, plaintiff may do a small total business within the State of Maine, by selling ten thousand different preparations. Under the statute it must pay five thousand dollars per year. A competitor of the plaintiff may do a much greater total business within the State of Maine, by selling a single preparation. Even though the inspection of the competitor's merchandise will involve much greater expense than the inspection of plaintiff's merchandise, such competitor need pay only fifty cents. Likewise, a competitor of the plaintiff may do a very large business on a single preparation, and allow the retailer a tremendous profit, so that the retailer charges five dollars for a box of face powder which costs the retaiiler one dollar. Under the statute the inspectors of the state must pay the retailer his full retail price, thus using fees exacted from the plaintiff for the purpose of paying a retailer a handsome profit for selling a product of a competitor to the state inspector.

Unequal taxation of this type, even if permitted on other grounds, is unconstitutional (*Stewart Dry Goods Co.* v. *Lewis*, 294 U. S. 550).

If the statute is constitutional, then any state can place an unlimited number of its citizens upon the payroll, as inspectors or the like, without arousing its taxpayers, because the expenses and salaries will be collected from out-of-state manufacturers.

As pointed out in the case of *George H. Lee Co.* v. *Webster* (*supra*, p. 26), the exaction of a tax of this type, is similar to the imposition of an import duty.

The "original package" doctrine is sufficiently flexible to take care of this situation.

Baldwin v. *G. A. F. Seelig, Inc.*, 294 U. S. 511.

As appears from the decision of the District Court (7 Fed. Supp. 776), "Seelig" brought large original cans of milk into New York from Vermont. Some of this milk was sold in New York, in the original large cans which were brought into the state by "Seelig".

"Seelig" also bottled some of this milk in New York, and it sold the bottled milk to local customers in New York (7 Fed Supp. on p. 777). This was a clear breaking of the original package.

The New York Milk Control Act set up a system of minimum prices to be paid by dealers to producers. "Seelig" bought its milk from a creamery in Vermont at prices lower than the minimum prices which were required to be paid to producers in New York under the New York Act. Thereupon a license was refused to "Seelig" in New York, unless it agreed to conform to the New York statute and the regulations thereunder.

This Court held that New York had no power to project its legislation into Vermont.

It also held that "Seelig" had the right to sell the bottled milk, even though it was not sold in New York in the original can or package.

On page 526 this Court stated,

> "The test of the 'original package', which came into our law with Brown v. Maryland, 12 Wheat. 419, 6 L. Ed. 678, is not inflexible and final for the transactions of interstate commerce, whatever may be its validity for commerce with other countries.
>
> • • • • • • • •
>
> There are other purposes for which the same merchandise will have the benefit of the protection appropriate to interstate commerce, though the original packages have been broken and the contents subdivided.
>
> • • • • • • • •
>
> In brief, the test of the original package is not an ultimate principle. It is an illustration of a principle."

The principle set forth in the case of *Baldwin* v. *G. A. F. Seelig, Inc.*, has been followed in subsequent decisions, such as,

> *Langendorf United Bakeries, Inc.* v. *City of Reno*, 16 Fed. Suppl. 442,

decided on March 26th, 1936.

The Court held unconstitutional an ordinance of the City of Reno, which required inspection by the city food inspector of all bakery products sold in the city, insofar as this applied to bakery products which were made in California and which were shipped to Reno, and there sold only at wholesale by the plaintiff.

The Court stated,

(p. 442)

> "No showing has been made that plaintiff's products shipped by public utility or common carriers into the state of Nevada have been subject to unhealthy conditions or are unhealthy in fact."

(p. 443)

> "From the opinion in the Minnesota v. Barber case, supra, by Mr. Justice Harlan, we quote: 'It will not do to say—certainly no judicial tribunal can with propriety assume—that the people of Minnesota may not, with due regard to their health, rely upon inspections in other states of animals there slaughtered for purposes of human food.'"

Likewise in the instant case, there is absolutely no proof that the products of the plaintiff are injurious.

On the contrary the evidence shows without contradiction that the products of the plaintiff have conformed to all state and federal statutes, and that they have been pure and harmless in each and every respect.

(R. p. 69)

> "During my twenty years' connection with plaintiff no proceeding has ever been taken to my knowledge against the products of plaintiff by any governmental authority in the United States on the ground that these preparations are harmful."

As pointed out on pages 74 and 75 of the record, no complaint has ever been made by any state or by the Federal Government in the United States, relative to plaintiff's preparations. Only one complaint has been received during this period of forty years, because a woman applied the face powder so carelessly that the powder entered her eyes, so as to produce a natural irritation due to the presence of a large amount of powdered material. This irritation did not result from the use of an unsuitable ingredient.

The state does not have the constitutional power to exact a registration fee, as a condition precedent to the sale of merchandise within the state.

The power of a state to pass an inspection law is found by an analogy in the Constitution of the United States of America, Article I, Section 10, Clause 2, which is as follows:

> "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws; and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress."

Bowman v. *Chicago & N. W. Ry. Co.*, 125 U. S. 465.

This case involved an Iowa statute which forbade any railway company or other common carrier from bringing within the state any intoxicating liquors,

> "without first having been furnished a certificate from and under the seal of the county auditor of the county to which said liquor is to be transported, or is consigned for transportation, or within which it is to be conveyed from place to place, certifying that the consignee or person to whom said liquor is to be transported, conveyed, or delivered is authorized to selling such intoxicating liquors in such county."

Any common carrier which violated this statute was subject to a penalty of one hundred dollars for each offense,

The defendant railway company refused to accept intoxicating liquors for delivery within the State of Iowa, in the absence of the certificate required by law.

This Court stated as follows:

> "It is impossible to justify this statute of Iowa by classifying it as an inspection law. The right of the states to pass inspection laws is expressly recognized in article I, Sec. 10, Const., in the clause declaring that 'no state shall, without the consent of congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws.' • • • 'And all such laws shall be subject to the revision and control of the congress.' The nature and character of the inspection laws of the states, contemplated by this provision of the constitution, were very fully exhibited in the case of Turner v. Maryland, 107 U. S. 38, 2 Sup. Ct. Rep. 44. 'The object of inspection laws,' said Chief Justice Marshall in Gibbons v. Ogden, 9 Wheat. 1, 203, 'is to improve the quality of articles produced by the labor of a country, to fit them for exportation, or, it may be, for domestic use. They act upon the subject, before it becomes an article of foreign commerce, or of commerce among the states, and prepare it for that purpose.' They are confined to such particulars as in the estimation of the legislature, and according to the customs of trade, are deemed necessary to fit the inspected article for the market, by giving to the purchaser public assurance that the article is in that condition, and of that quality, which makes it merchantable, and fit for use or consumption. They are not founded on the idea that the things in respect to which inspection is required, are dangerous or noxious in themselves. As was said in

> Turner v. Maryland, 107 U. S. 38, 55, 2 Sup. Ct. Rep. 44, 58: 'Recognized elements of inspection laws have always been quality of the article, form, capacity, dimensions, and weight of package, mode of putting up, and marking and branding of various kinds; all these matters being supervised by a public officer having authority to pass or not pass the article as lawful merchandise, as it did or did not answer the prescribed requirements. It has never been regarded as necessary, and it is manifestly not necessary, that all of these elements should co-exist, in order to make a valid inspection law. Quality alone may be the subject of inspection, without other requirement, or the inspection may be made to extend to all of the above matters.' It has never been regarded as within the legitimate scope of inspection laws to forbid trade in respect to any known article of commerce, irrespective of its condition and quality, merely on account of its intrinsic nature, and the injurious consequences of its use or abuse."

This decision makes it clear that an inspection law does not apply to the presence of dangerous natural ingredients. The state can prohibit the sale of such merchandise, but it cannot charge fees for inspecting it. Inspection laws apply to products which can decompose or change, so as to make them unfit for use, such as foods.

Likewise it will be noted that Article I of the Constitution provides that the expense necessary for executing a state inspection law is to be derived by means of *duties* on merchandise coming within the state. This necessarily is the exact opposite of a fixed registration fee to be paid in advance upon each trade-mark or preparation, irrespective of the amount of such trade-marked preparation which is

brought within the state. The only constitutional manner in which a state can pay for the expense of executing a legitimate inspection law, is by means of a fee which based upon the amount of merchandise which is brought within the state.

Likewise, in *Vance* v. *W. A. Vandercook Co.*, 170 U. S. 438, it was attempted to uphold a South Carolina law which required the filing of a sample of liquor which was brought within the state, with an official chemist, prior to bringing in the liquor. This law was held void, because the South Carolina statute, like the Maine statute in issue, did not provide for inspection of the merchandise as it was brought into the state.

This Court stated:

> "But it is obvious that this argument is unsound, as the inspection of a sample sent out in advance is not in the slightest degree an inspection of the goods subsequently shipped into the state. The sample may be one thing, and the merchandise which thereafter comes in another. It is hence beyond reason to say that the law provides for an inspection of the goods shipped into the state from other states, when in fact it exacts no inspection whatever. Conceding, without deciding, the power of the state, where it has placed the control of the sale of all liquor within the state in charge of its own officers, to provide an inspection of liquors shipped into a state by residents of other states for use by residents within the state, it is clear that such a law, to be valid, must not substantially hamper or burden the constitutional right, on the one hand, to make, and, on the other, to receive, such shipment. A law of this nature must, at least, provide for some inspection of the article, to justify its being an inspection law."

The statute is unconstitutional because no attempt has been made to allocate the expense of enforcing the statute from the expense of administering other statutes of the state. Likewise no attempt has been made to allocate the expense of inspecting preparations made within the state, from the expense of inspecting preparations made outside of the state.

Findings of Fact Nos. 19, 20 and 22 are as follows (R. p. 57):

"19. Prior to the time of the hearing on the plaintiff's bill on June 24th, 1936, no attempt had been made by said Department of Health & Welfare to determine what portion of the time of these investigators or inspectors employed by said Department of Health & Welfare was spent in securing cosmetics for the purposes of analyses, in order to enforce said Chapter 109, and what portion of the time of these employees was devoted to other purposes.

20. Up to June 24, 1936, said Department of Health & Welfare had not designated any employee or employees for the sole purpose of visiting retail stores in the State of Maine, inspecting their stocks of cosmetic preparations, and picking up samples thereof for analysis, in order to enforce said Chapter 109.

22. No evidence was offered by the defendants to show what part of the fees collected under Chapter 109 has been expended prior to June 24, 1936, in enforcing said Chapter 109 relative to cosmetic preparations made within the State of Maine, as distinguished from the cosmetic preparations made outside of the State of Maine by plaintiff and other out-of-state manufacturers of cosmetic preparations."

Plaintiff took the testimony of Elmer W. Campbell, who is the Public Health officer in charge of this work. This witness testified that while certain investigators or inspectors had been directed to pick up cosmetics, no attempt had been made to determine what part of their time was devoted to other duties (R. p. 167, fol. 25). One of these employees spent all his time in visiting stores in order to ascertain the retailers of cosmetic preparations. Another agent made routine inspection of beauty parlors in order to see whether they were obeying a statute other than the one in issue (R. p. 168, fol. 254).

Hence it clearly appears from the record that the fees collected under this statute are being used to pay the expenses for enforcing another local statute and no attempt has been made to determine how much the state has spent in analyses and other expenses incident to the enforcement of the statute in issue, in connection with cosmetics manufactured *outside* of the state.

Cleveland Refining Co. v. *Phipps*, 277 Fed. 463, affirmed 261 U. S. 479.

The last-mentioned case involved an Ohio statute which provided for the inspection of petroleum, illuminating oils and the like. Part of the statute was constitutional because it provided for inspection fees which were based on the quantity of merchandise brought within the state, and such fees were paid by the local distributor (273 Fed. on p. 467).

The Court stated (277 Fed. pp. 466 and 467):

> "It is significant that the state has not, at any time, in the enforcement of the law, kept or endeavored to keep a separate record of interstate and intrastate shipments, or of the sums realized from their inspection,—" • • •

"In the light of Castle v. Mason, supra, and Foote v. Maryland, 232 U. S. 494, 34 Sup. Ct. 377, 58 L. Ed. 698, as well as of the express provisions of the act, such construction is correct, for the reason the statute does not contemplate a separation of interstate and intrastate shipments and contains no provisions for a separate record or accounting for the same, or from whom and where purchased, or from whence shipped, or any suggestion of a classification with reference to the character of the shipments. It applies generally to any and all kerosene, petroleum, and petroleum products, whether manufactured in this state or not, and whether shipped wholly within the state or from other states into this. Shipments of both classes, without discrimination or intent of separation, are subjected to the provisions of the act, are classified collectively with reference to the quantity only of fluids inspected, are charged with the same fees, and the commingled receipts arising from their inspection are required to be paid into the state treasury. The act, except as to the amount of fees charged for inspection, is in its essential details, and even in nearly all of the language employed, a re-enactment of the law declared unconstitutional in Castle v. Mason, supra, in which case it was found that such earlier act does not materially differ from the law declared void in Foote v. Maryland and that considered in Red C Oil Mfg. Co. v. Board of Agriculture, supra."

Defendants herein take the position that the plaintiff must prove affirmatively that the fees are in excess of the cost of administering this statute. Under the decisions of this Court cited in *Cleveland Refining Co.* v. *Phipps*, the

burden is primarily upon the state to maintain a system of records whereby this determination can be made. If the state commingles the expenses of administering this statute, with the expenses of administering other statutes, as in the instant case, it is impossible to determine whether or not the fees are reasonable.

Likewise Section 1 of the statute requires the inspection of the products of local manufacturers who operate beauty parlors and the like and who make up their own hair tonics and other cosmetic preparations.

Separate records must be kept of the expense of inspecting merchandise made within the state, in order to avoid placing an unfair burden on interstate commerce.

In the case of,

D. E. Foote & Co. Inc. v. *Stanley*, 232 U. S. 494,

this Court pointed out that where funds were thus commingled, the state could meet the presumption of invalidity,

> "by carrying the burden of showing that, while the statute required payment out of which joint fund, the collections were not sufficient, but only helped to pay the definitely ascertained expenses of inspection."

This Court further pointed out that while excess fees might be valid "as a tax on property in Maryland", said excess fees were,

> "a burden on interstate commerce when levied upon oysters coming from other states. This fact renders the whole tax void • • •."

The statute is unconstitutional because it delegates to an administrative body, the arbitrary and *ex parte* power to grant original certificates, to deny the renewal of original certificates, and to prohibit the sale of cosmetics even during the term of an original certificate or a renewal certificate. The right to review the refusal to grant an original certificate does not give any remedy, in view of the fact that the Department is not required to take any testimony or to render any opinion. The statute does not even purport to give the right to review a refusal of the Department to renew a certificate, and it does not purport to give the right to review the prohibition of the sale of a cosmetic by the Department during the term of an original certificate or of a renewal certificate.

We have previously pointed out (*supra* pp. 19-21) the unlimited *ex parte* power which is given to the Department, "in its judgment".

The Department of Health and Welfare is a branch of the Executive Department. The Commissioner of Health is appointed by the Governor, with the advice and consent of the Public Health Council, who are also appointed by the Governor. (Revised Statutes of Maine, 1930 Ed., pp. 447 and 448, *infra* p. 53.)

It is well settled, both under the Constitution of the United States, and under the Constitution of Maine, that the Legislature cannot delegate its authority to the Executive (*A. L. A. Schechter Poultry Corp.* v. *United States*, 295 U. S. 495; *Wichita Co.* v. *Public Utilities Commission*, 260 U. S. 48; *Cape Elizabeth* v. *Boyd*, 86 Me. 317; *State* v. *Butler*, 105 Me. 91).

The pertinent portion of the Constitution of Maine is as follows:

"ARTICLE III.

DISTRIBUTION OF POWERS.

"Sec. 1. The powers of this government shall be divided into three distinct departments, the Legislative, Executive and Judicial.

"Sec. 2. No person or persons, belonging to one of these departments, shall exercise any of the powers properly belonging to either of the others, except in the cases herein expressly directed or permitted."

In the case of,

State v. *Butler*, 105 Me. 91,

the Court cited with approval, the case of

Noel v. *The People*, 187 Illinois 587,

which is a leading case on this subject.

Section 8 of the Illinois act in issue was as follows (187 Ill. 590):

"The Board of Pharmacy may in their discretion issue permits to persons, firms or corporations engaged in business in villages or other localities, empowering them to sell the usual domestic remedies and proprietary medicines under such restrictions as the Board of Pharmacy may deem proper. Each applicant for this permit shall pay to said board the sum of one dollar before said permit shall issue. Said permit shall specifically state just what the holder thereof is allowed to sell."

The Court stated (pp. 591 and 592):

"It is manifest, that section 2 vests an arbitrary power in the Board of Pharmacy to say who shall,

and who shall not, sell the usual domestic and proprietary remedies in village and other localities, and just exactly what they are allowed to sell. Section 8 in no way regulates or controls the discretion vested thereby in the Board. The official discretion, conferred upon the board, is unregulated, and not subject to any permanent provisions operating generally and impartially. No conditions are prescribed, upon which the permit, authorizing the sale of the usual domestic remedies and proprietary medicines, is to be issued. A law which thus invests any board, or body of officials, with a discretion, which is purely arbitrary, and which may be exercised in the interest of a favored few, is invalid. It makes an unjust discrimination between persons coming within the same class. A person, firm or corporation engaged in business in a village or other locality may sell these domestic remedies and proprietary medicines if a permit is obtained from the Board of Pharmacy, provided such board sees fit in its discretion, and under such restrictions as it may deem proper, to issue such permit. The board is thus authorized to confer a privilege upon one person, firm or corporation, and to deny the same privilege to any other person, firm or corporation, and is not required to be governed, in doing so, by any fixed rules or regulations, but may be moved thereto only by its own caprice, or favoritism. Laws, thus conferring discretionary and arbitrary powers upon statutory officials, are not only invalid for the reasons already stated, but amount in effect to a delegation by the legislature of its legislative functions to the board of officials in question."

In the *"Schechter"* case, this Court pointed out that in providing for expert bodies to deal with certain problems, the

> "administrative agency, in dealing with particular cases, is required to act upon notice and hearing, and

its orders must be supported by findings of fact which in turn are supported by evidence" (295 U. S., p. 539).

"These standards established by Congress were to be enforced upon hearing and evidence by an administrative body acting under statutory restrictions adapted to the particular activity" (295 U. S., p. 540).

Numerous earlier cases have held that the rights of citizens cannot be left to executive officers, who can act without hearing.

Regal Drug Corporation v. *Wardell*, 260 U. S. 386.

The Court enjoined the collection of certain fines which had been levied by the Commissioner of Internal Revenue without notice or hearing.

Central Railway Co. v. *Wright*, 207 U. S. 127.

The tax laws of Georgia permitted *ex parte* valuation of the taxpayer's property, save where fraud or corruption was shown in the action of the assessing officer. This was held unconstitutional.

A similar ruling was made in a rate case in,

Chicago R. R. Co. v. *State of Minnesota*, 134 U. S. 418.

"No hearing is provided for; no summons or notice to the company • • • no opportunity provided for the company to introduce witnesses before the commission,—in fact nothing which has the semblance of the process of law."

United States v. *McMurtry*, 48 Fed. (2nd) 258, p. 260,

"No authority was given to the War Industries Board to impose penalties, nor could Congress dele-

gate to it such a matter. *United States* v. *Grimaud*, 220 U. S. 506, 31 S. Ct. 480, 55 L. Ed. 563; *United States* v. *Eaton*, 144 U. S. 677, 12 S. Ct. 764, 36 L. Ed. 591)."

The words "in its judgment" must have been inserted in Section 2 in order to make the *opinion* of the Department binding, if there was a fair difference of opinion between physicians as to the merits of a particular cosmetic. The statute goes even further, and it makes the opinion of the Department conclusive, even if it is contrary to the consensus of medical opinion.

Since the statute does not provide for a hearing before the Department, "judgment" is not equivalent to "decree".

One of the meanings of "judgment" is,

> "An opinion formed or put forth; a conclusion drawn from premises; a decision based on observation or belief; an estimate; a view" (The Century Dictionary and Encyclopedia, 1911 edition, Vol. 5, p. 3247).

The courts have repeatedly recognized the fact that medicine is not an exact science, and that there are conflicting schools of medicine.

> "The most liberal allowance should be made for difference of medical opinion" (Moxie Nerve Food Co. v. Modox Co., 152 Fed. 493, p. 505).

The test is "the weight of medical authority" (152 Fed. on p. 505).

> *Stune* v. *United States*, 27 Fed. (2nd) 575, C. C. A. 8th, p. 578,
>
> "Medicine is not an exact science."

It is difficult to conceive of a more arbitrary and unreasonable statute.

As stated in,

Panama Refining Co. v. *Ryan*, 293 U. S. 388, on p. 432:

> "If the citizen is to be punished for the crime of violating a legislative order of an executive officer, or of a board or commission, due process of law requires that it shall appear that the order is within the authority of the officer, board, or commission, and, if that authority depends on determinations of fact, those determinations must be shown. As the Court said in Wichita Railroad & Light Co. v. Public Utilities Commission, 260 U. S. 48, 59, 43 S. Ct. 51, 55, 67 L. Ed. 124: 'In creating such an administrative agency, the Legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of that function.' "

The statute in issue should have provided for the fundamental rights of notice, open hearing, the right to present testimony and to cross examine, and fair opportunity to comply with rulings. Likewise the statute should have required the recording of all testimony and proceedings, in order to furnish a basis for review. Retroactive rulings should not be permitted. If the Department refuses to renew a certificate, or if it prohibits the sale of merchandise during the term of a certificate, opportunity must be given to dispose of goods on hand.

In

E. Fougera & Company v. *City of New York*, 224 N. Y. 269,

an ordinance was passed prohibiting the sale of patent medicines, unless their principal ingredients were disclosed. The

ordinance did not exempt existing stocks of merchandise. This was held unconstitutional.

> "Without warning and without fault, its right of property has been forfeited. There must be many others in a like predicament. We do not need to say that there is no power even in the legislature to work this forfeiture. • • •
>
> The defect is so far reaching, it is so deeply wrought into the substance of the law, that there is no opportunity to sever the good from the bad."

Randall v. *Patch*, 118 Me. 303, page 305:

> "Notice and hearing are of the essence of due process of law • • •.
>
> An act that purports to authorize procedure depriving an owner of his property without opportunity for hearing and without notice violates both the Federal and State Constitutions."

In *Dunn* v. *Burleigh*, 62 Me. 24, on pages 36 and 37, it was held that in order to confiscate property,

> "something more is necessary than an ex parte determination and command of the land agent."
>
> *State* v. *Burdage*, 95 Wis. 390, 70 N. W. 347.

Under state law, the Board of Health was given the authority (italics ours)

> "to make such rules and regulations and to take such measures as may, *in its judgment*, be necessary for the protection of the people."

The Court held that this was void as being,

> "an absolute delegation of the legislative power."
>
> *Schaezlein* v. *Cabaniss*, 135 Cal. 466, 67 Pac. 655.

The statute provided that if factory work produced injurious gases or the like, the Commissioner of the Bureau of Labor was given the right to issue an order directing the use of an approved mechanical appliance for preventing the inhalation of the gas. A violation of the Act was made a misdemeanor. The statute did not provide for a hearing before the Commissioner.

The Court stated:

> "• • • it is an attempt to confer upon a single person the right to determine not only that the sanitary conditions of a workship or factory is not reasonably good, but to say whether, even if reasonably good, *in his judgment*, its condition could be improved by the use of such appliances as he may designate, and then to make a penal offense of the failure to install such appliances. 'The very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself' (Yick Wo v. Hopkins, 118 U. S. 356. • • •
>
> But the *judgment* of the commissioner is not only the determinative factor • • • but under this law is absolutely conclusive and binding" (italics ours).

A similar ruling was made in *Ex parte Peppers*, 189 Cal. 682, 209 Pac. 896, where the Director of Agriculture was given *ex parte* power to issue regulations for preventing the sale of citrus fruit which was,

> "frosted to the extent of endangering the reputation of the citrus industry."

As stated by the Circuit Court of Appeals in,

> *Butler* v. *U. S.*, 78 Fed. (2nd) 1, pages 8 and 9 (aff. 297 U. S. 1),

where powers have been held properly delegated, the delegated authority was purely ministerial,

> "or a power to determine, *after notice and hearing*, certain facts upon which the operation of congressional edicts are made to depend • • • and from the findings of which commission judicial review is provided for.
>
> The power to determine what the law shall be, what property shall be affected by taxation or regulation, *and what standards* shall govern the administrative officers in administering acts of Congress has never been held to be an administrative function."

The statute is void because it imposes an impossible standard of uniformity.

We have previously pointed out that the defendants will administer the statute in accordance with the opinion of the Attorney General (R. p. 39, fol. 73) which requires registration for each and every preparation "which differs from another preparation in color".

As stated previously (*supra*, pp. 23 and 24) it is impossible to produce cosmetic preparations with the uniformity required by this opinion.

Likewise, it is impossible to manufacture cosmetics precisely according to formula or sample.

It has been frequently held that a state cannot require a uniformity of manufacture which is impossible in actual commercial production, if such uniformity has no reasonable relation to the public health.

Burns Baking Co. v. *Bryan*, 264 U. S. 504;
Holsum Baking Co. v. *Green*, 45 Fed. (2nd) 238.

An injunction should be granted restraining the defendants from requiring separate registrations for preparations having formulas which are identical, save for the use of perfumes, and from otherwise exceeding their statutory power.

Since Section 3 of the statute expressly excludes perfumes, a perfume *per se* need not be registered.

Hence if a manufacturer makes the identical face powder in the unperfumed form, and also in the perfumed form, he should not be compelled to take out two registrations.

Likewise if a manufacturer sells the unperfumed face powder under one trade name, and he sells the perfumed face powder under a different trade name, he should not be compelled to take out two separate registrations.

The defendants have clearly gone beyond the scope of Section 3 of the statute, in requiring separate registrations according to differences in trade name, color, or odor as required by the rulings set forth on pages 39-41 of the Record. If a manufacturer puts out the same powder in a cheap box and in a fancy box, using two different trade names, the preparation is the same, and only a single fee should be required.

The statute is void because it provides for unreasonable searches and seizures and forfeitures.

It is well settled that proceedings in seizure and forfeiture come within the Fourth Amendment to the Constitution of the United States (*U. S.* v. *Eight Packages*, 5 Fed. (2nd) 971 on p. 976).

The Fourth Amendment and the Constitution of Maine (Article I, Sec. 5) protect citizens,

"from all unreasonable searches and seizures".

As stated in the case of *U. S.* v. *Eight Packages*, 5 Fed. (2nd) 971 on p. 976, a seizure cannot be made save on a verified warrant which must show probable cause.

The prohibition against unreasonable searches and seizures extends to places of business (*U. S.* v. *One Kemper Radio*, 8 Fed. Supp. 304).

Likewise a proceeding to forfeit property is within the protection of the Fourth and Fifth Amendments to the Constitution of the United States (*U. S.* v. *Fifty-eight Drums*, 38 Fed. (2nd) 1005 on p. 1007).

The Constitution of Maine (Article I, Sec. 6) gives the defendant the right to trial, "by a jury of the vicinity" in all criminal prosecutions "except in trials by martial law or impeachment". This corresponds generally to the Sixth Amendment to the Constitution of the United States.

For this reason the Federal Pure Food and Drug Act gives the right to a trial by jury in proceedings to condemn merchandise (U. S. Code, Title 21, Sec. 14).

Numerous decisions have held that merchandise cannot be condemned on land, as distinguished from a seizure on sea, without trial by jury (*The Sarah*, 8 Wheaton, 21 U. S. p. 390).

It has been held that a state, as well as the United States, cannot seize property,

> "without giving to its owner the trial by jury" (*The J. W. French*, 13 Fed. 916 on p. 924).
>
> *United States* v. *One Ford Sedan*, 297 Fed. 830, C. C. A. 5th.

It was held that an automobile which had been used in the concealment of intoxicating liquor could not be forfeited without trial by jury.

The Court cited a case under the Federal Pure Food & Drug Act.

Sections 5-7 of the Maine Act do not provide for a trial by jury. Section 5 permits a seizure of original packages, without a warrant. As previously pointed out, if the Department refuses to renew a registration, or if it prohibits the sale of a preparation during the term of a registration, no notice is required, and no time is given to dispose of stock on hand. At the hearing provided in Sections 6 and 7, no jury trial is provided and no defense can be interposed, save that the owner of the seized property intended to ship the merchandise out of the state, instead of keeping it "for unlawful use or sale in this State". The owner of the seized merchandise has no right, at any time, to attempt to prove that the seized merchandise was pure and harmless.

The obvious intent of the statute was to impose such drastic fines, penalties, and forfeitures as to prevent a test of the constitutionality of the statute.

The good-will of a manufacturer depends on continuous sales. If the "Bourjois" preparations are off the market in Maine for a month, the public will turn to competing merchandise, and plaintiff will find it very difficult to recover its trade. The Courts have repeatedly invalidated statutes in which the punishment was calculated to prevent a fair test of constitutionality.

Wadleigh R. R. Co. v. *State of Georgia*, 235 U. S. 651; *Oklahoma Co.* v. *Love*, 252 U. S. 331, p. 337.

The statute is void because Section 10 makes it a penal offense to violate "any ordinance, or by-law, or regulation made thereunder".

Section 2 authorizes the Department, "to make such regulations as may be necessary for carrying out the purpose of this act to safeguard the public health."

If an unreasonable regulation is adopted, no defense is permitted by Section 10.

No limitation is imposed upon *ordinances* and *by-laws*. These are left to the arbitrary power of the Department.

The Legislature cannot delegate the right to pass criminal laws to the executive. (*United States* v. *McMurtry*, 48 Fed. (2nd) 258, on p. 260; *Regal Corporation* v. *Wardell*, 260 U. S. 386.)

In proceedings brought to enforce the Maine law, there should be a showing of extrinsic facts, namely, that the ruling or regulation or ordinance or by-law was necessary to protect the public health. No proof can be offered as to these extrinsic facts, if there is a seizure and forfeiture under the Maine law.

No appeal or other method of review is provided, in order to test the validity of the ex parte ordinances, regulations, and by-laws.

Respectfully submitted,

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Hugo Mock,
Robert Hale,
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APPENDIX TO BRIEF.

CHAPTER 22:

Sec. 1. The state department of health as heretofore established shall consist of a commissioner of health and a public health council:

Sec. 3. The commissioner of health shall be appointed by the governor with the advice and consent of the council.

Sec. 4 provides that the public health council shall,

> "consist of a commissioner of health and five other members, • • • all of whom shall be appointed by the governor with the advice and consent of the council."

MAR 1 1937
CHARLES ELMORE CROP
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Supreme Court of the United States

October Term, 1936

BOURJOIS, INC.,
Appellant,

vs.

CLYDE R. CHAPMAN, GEORGE W. LEADBETTER and GEORGE H. COOMBS,
Appellees.

No. 534

BRIEF FOR APPELLEES

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RALPH W. FARRIS, *Assistant Attorney General.*
CLYDE R. CHAPMAN, *Former Attorney General.*
Counsel for Defendants-Appellees.

Supreme Court of the United States

October Term, 1936

BOURJOIS, INC., *Appellant,* vs. CLYDE R. CHAPMAN, GEORGE W. LEADBETTER and GEORGE H. COOMBS, *Appellees.*	**No. 534**

BRIEF FOR APPELLEES

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Supreme Court of the United States

October Term, 1936

BOURJOIS, INC. *Appellant,* *vs.* CLYDE R. CHAPMAN, GEORGE W. LEADBETTER and GEORGE H. COOMBS, *Appellees.*	**No. 534**

STATEMENT OF CASE

The legislature of Maine at its regular biennial session in 1935, passed an Act entitled "An Act for the Regulation of Cosmetics" which said Act is contained in Chapter 109 of the Public Laws of Maine, 1935. (See Appellants brief p. 3.)

On December 10, 1935, the within named plaintiff a New York Corporation filed a Bill in Equity in the United States District Court of the District of Maine, seeking to enjoin the defendants who at that time were serving in their official capacities as Attorney General, Commissioner of Health and Welfare and Director of Public Health, from enforcing said Act, on the ground that the Act violated Secs. 8 and 10 of Art. 1 of the Constitution of the United States and also the Constitution of Maine.

An answer was filed by defendants denying the material allegations set forth in plaintiff's bill and the case came on for hearing before a statutory court composed of three judges under Section 380, Title 28 U. S. Code on January 3, 1936, at Portland, Maine, and the Court rendered its opinion February 19, 1936, denying temporary injunction, but giving plaintiff

leave to renew motion for a temporary injunction in case Interstate Commerce was in the future unduly interferred with, or due process of law denied the plaintiff by enforcement of any of the provisions of the Act, or regulations adopted thereunder.

On April 3, 1936, the plaintiff filed a supplemental bill of complaint renewing its motion for an injunction both preliminary and permanent, seeking again to enjoin the defendants from enforcing the Act. On April 15, 1936, the plaintiff filed interrogatories which were answered by the defendants May 13, 1936. (See R. pp. 30 and 36.)

On June 15th, the defendants filed supplemental answer, and the case again came on for hearing on the supplemental bill and answer on June 24, 1936, and the Court rendered its opinion denying the plaintiff's motion for an interlocutory and permanent injunction, dismissing the complaint with a single bill of costs.

Findings of Fact and Conclusions of Law were filed September 29, 1936. (See R. p. 54.)

An order denying interlocutory injunction and final decree was filed October 7, 1936; Petition for Appeal was filed October 15, 1936, together with assignment of Errors. (R. pp. 60 and 62.) and Order Allowing Appeal was filed October 20, 1936, and the case now comes before this Honorable Court for argument.

Analysis of the Statute

1. The statute in question does not attempt to compel plaintiff to pay the costs of administering the State law. In other words the statute does not affect the plaintiff in this case for the reason the plaintiff is not engaged in intra-state commerce in the State of Maine.

2. The State under its police power has a right to enact legislation to safeguard the public health by requiring local dealers in the State of Maine to register and secure certificate of same before selling cosmetics to the citizens of Maine, and the Department is authorized under the statute to refuse a certificate of registration or prohibit the sale of cosmetic preparation which in its judgment contains injurious substances in such amounts as to be poisonous, injurious or detrimental to the person. (See Sec. 2 of the Act.)

The appellant argues the statue is unconstitutional because no attempt has been made to allocate the expense of enforcing the statute from the expense of administering other statutes of the state. In answer to interrogatory No. 27, the defendants state, "A separate account has been set up in the State Treasurer's Department to which all cosmetic fees are credited, which are to be expended by the department entirely for the enforcement of Chapter 109 of the Public Laws of 1935." (R. p. 39.)

3. The Statute does not attempt to exact a registration fee from foreign corporations engaged in an interstate commerce business with local dealers in the State of Maine.

4. The Statute delegates only reasonable powers to the Department of Health and Welfare to promulgate rules and regulations to carry out the purpose of the act to safeguard the public health. In case of refusal of said department to issue a certificate of registration for any cosmetic preparation

appeal shall lie to the Superior Court in any county in the State, and the renewal of a certificate is equivalent ipso jure to the issuance of an original certificate.

5. Section 1 provides for the registration of cosmetics with the Department of Health and Welfare. Section 2 authorizes the Department of Health and Welfare to issue certificates of registration, affix the fees, etc., and provides for appeal in case of refusal to issue certificate of registration for any cosmetic preparation. Section 3 defines cosmetic preparations, and Section 4 validates permits issued under the Public Laws of 1933. Section 5 provides for cosmetic preparations kept or deposited for unlawful sale or use in this state and the forfeiture thereof, and gives the sheriffs, deputy sheriffs, police officers, state police officers and duly authorized agents of the Department of Health and Welfare power to seize the same. Section 6 prescribes the duties of the officers of the Department of Health and Welfare in regard to cosmetic preparations which are seized by the officers or duly authorized agents of the department. Section 7 provides a forfeiture in case no claimant appears. Section 8 provides that if any section or part thereof, of this act, shall be declared unconstitutional it shall not affect the constitutionality of the remaining parts of this act. Section 9 provides for exceptions of preparations purchased prior to the effective date of this act. Section 10 prescribes the penalty for violation of any provisions of the act or regulations made thereunder, and Section 11 provides for repeal of Chapter 278 of the Public Laws of 1933.

The purpose of the act is manifest. It was an act passed for the purpose of protecting the health and safety of the people of the State of Maine, and as such was a valid exercise of the police power of the State.

Summary of Argument

1. The statute is not unconstitutional as a regulation or burden on interstate commerce.

2. The statute does not delegate legislative functions.

3. The statute is not unconstitutional by reason of the due process clause of the Federal Constitution.

4. The statute is not unconstitutional in that the fees may be devoted to purposes other than inspection of cosmetics because the act provides fees shall be used to carry out the purposes of the act, and will not be used for the inspection of interstate shipments.

5. Valuable property rights are not destroyed by ex parte orders of the Department of Health and Welfare as the act provides for appeal and also for a penalty for violation of any provisions of the act or any regulation made by the department.

6. The penalty as fixed by the statute is not excessive and does not prevent complainant from testing constitutionality of act.

7. The Legislature in the exercise of the police power may regulate, restrain and prohibit whatever is injurious to the public health and morals.

ARGUMENT

Defense of Statute

Section 1 applies only to those persons, firms or corporations doing business in intra-state commerce and does not apply to the plaintiff a foreign corporation doing an interstate commerce business. The act is not limited to beauty shops, barber shops or similar establishments. It applies to all persons, firms or corporations who sell or offer for sale in Maine unregistered cosmetics in intra-state commerce (Sec. 1 of Act.) A separate account of the cost of enforcement of the act and the receipts from registration fees are kept in the State Treasurer's Office. (See Ans. to Int. No. 27, R. p. 39.)

The statute defines "cosmetic preparations" in Sec. 3 of the Act, and the only requirement of the statute is that dealers or manufacturers doing an intra-state commerce business in the State of Maine in cosmetics shall secure a certificate of registration from the Department of Health and Welfare which is issued to said dealers after an analysis of the cosmetic preparation and which in its judgment contains no injurious substances in such amounts as to be poisonous, injurious or detrimental to the person.

It is admitted by the plaintiff's expert witness, Dr. J. Harper Blaisdell, that there are a certain number of cosmetics which are injurious to the health of the general public. (R. p. 156 and 164.)

"Fees received under the provisions of the act shall be used by said department for carrying out the purpose of this act." (Sec. 2 of Act.)

The act became effective on January 1, 1936, and the state officials, who are defendants and appellees in this case, notified local dealers in cosmetics that it was their intent to enforce same, but it has never required any firm, person or corporation

doing business outside the State of Maine to register its cosmetic preparation.

The appellant contends that the act violates Section 10 of Article 1, and also the fourteenth amendment of the Federal Constitution in that it imposes a burden on interstate commerce and deprives it of property rights without due process of law, however, statutory requirements are expressly limited by the act of intra-state commerce and the appellees submit that the provisions of the act and the rules thereunder in no way affect the plaintiff-appellant, and there is no evidence in the record that it has or ever will affect its rights.

The plaintiff-appellant further contends that the requirements affect every out of state manufacturer or producer of cosmetic preparations who sells cosmetic preparations to retailers in the State of Maine, and requires that they shall register each preparation and pay an initial registration fee of fifty (50) cents for each preparation and places a burden on interstate commerce. It is admitted by appellant that it ships its products into other states in the original packages consisting of a large carton in which is contained small articles of cosmetic preparations. (R. p. 88.) There is no evidence that the department has ever attempted to touch the original shipping package, however, there is evidence that the department does not intend to interfere with interstate commerce. (Testimony of Dr. Campbell R. p. 170.)

The appellees contend that the original package is the shipping container in which the cosmetic preparations are shipped into the state, and when they are removed therefrom and placed on the shelves or counters of the local dealers in Maine, they become mingled with the mass of property in the State and are no longer in interstate commerce and if unregistered in accordance with Section 2 of the Act, are subject to seizure and forfeiture.

This principle is borne out by the decisions. The law relating to original packages was first considered in Brown vs. Maryland, 12 Wheat. 419, in which the State of Maryland required all importers of intoxicating liquors by wholesale hogshead, barrel or tierce to take out a license which the Supreme Court held was repugnant to that provision of the Constitution forbidding a levying of a duty on imports as well as that declaring that Congress should have the power to regulate commerce with foreign nations.

In May vs. New Orleans, 178 U. S. 496, the Court said:

> "In our judgment the original package * * * * was the box or case in which the goods imported were shipped, and when the box was opened for sale or delivery of the separate parcels contained in it, each parcel lost its distinctive character as an import and became property subject to taxation by the State as other like proparty situated within its limits."

The principles laid down in Austin v. Tennessee, 179 U. S. 343, are decisive of the case here. The Court said, page 359:

> "The whole theory of the exemption of the original package from the operation of state laws is based upon the idea that the property is imported in the ordinary form in which, from time to time immemorial, foreign goods have been brought into the country. These have gone at once into the hands of the wholesale dealers, who have been in the habit of breaking the packages and distributing their contents among the several retail dealers throughout the State. It was with reference to this method of doing business that the doctrine of the exemption of the original package grew up. But taking the words 'original' package in their literal sense, a number of so-called original package manufactories have been started through the country, whose business it is to manufacture goods for the express purpose of sending their products into other States in minute packages, that may at once go into the hands of the retail dealers and consumers, and thus bid defiance to

> the laws of the State against their importation and sale. In all the cases which have heretofore arisen in this court the packages were of such size as to exclude the idea that they were to go directly into the hands of the consumer, or be used to evade the police regulations of the State with regard to the particular article."

Again, the Court said on page 360 of the above case:

> "This court has repeatedly held that, so far from lending its authority to frauds upon the sanitary laws of the several States, we are bound to respect such laws and to aid in their enforcement, so far as can be done without infringing upon the constitutional rights of the parties. The consequences of our adoption of defendant's contention would be far-reaching and disastrous. For the purpose of aiding a manufacturer in evading the laws of the sister State, we should be compelled to recognize anything as an original package of beer from a hogshead to a vial; anything as a package of cigarettes from an importer's case to a single paper box of ten, or even a single cigarette, if imported separately and loosely; anything from a bale of merchandise to a single ribbon, provided only the dealer sees fit to purchase his stock outside the State and import it in minute quantities."

While the court's conclusion in this case was grounded on the opportunity for fraud upon the health laws of a state, the opportunity is just as great in connection with cosmetic preparations, if the contention of the appellant is sustained in this case.

The principles laid down in Austin v. Tennessee were adhered to in Cook v. Marshall County, 196 U. S. 261, 269, 270, and cited with approval in Kirmeyer v. State of Kansas, 236 U. S. 568, 573; McDermott v. State of Wisconsin, 228 U. S. 116, 135; Hebe Co. v. Shaw, 248 U. S. 297, 304.

In Cleveland Macaroni Co. v. State Board of Health, 256 Fed. 376, in which the plaintiff's contention was the same as

that of the appellant here, viz; that the goods put up in separate packages were shipped in large shipping cases and taken out by the retailer and sold in the original packages in which they were put up, or the retailer removed them from the cases in which they were shipped and placed them on the shelves for sale to the consumer, the Court said:

> "Ordinarily such disposition withdraws goods shipped into a state from the domain of interstate commerce, and makes them a part of the general body of local commerce, and subjects them to any reasonable regulations by the State,"

citing Austin v. Tennessee, supra. The Court further said:

> "It appears from the defendant's return on the order to show cause that the plaintiff's goods were shipped into the state in large containers or boxes, each containing a certain number of small packages or paper cartons, in quantities suitable for sale to the consumer, and that it is in this latter form they are sold by retailers."

In McDermott v. State of Wisconsin, supra, the Court said:

> "And where it has been found necessary to decide the boundary of Federal authority it has been generally held that, where goods prepared and packed for shipment in interstate commerce are transported in such commerce and delivered to the consignee and the package by him separated into its component parts, the power of Federal regulation has ceased and that of the State may be asserted,"

citing the cases of Austin v. Tennessee, and Cook v. Marshall County, supra.

Some of the state cases in which the doctrine of the above cases have been applied are: Commonwealth v. Schollenberger, 156 Penn. St. 201; Haley v. Nebraska, 42, Nebr. 556; McGregor v. Cone, 104, Iowa, 465, 471, 473; State v. Winters, 44 Kan. Sup. 723.

In Commonwealth v. Schollenberger, supra, the Court in defining an original package, said:

> It is "such form and size of package as is used by producers or shippers for the purpose of securing both convenience in handling and security in transportation of merchandise between dealers in the ordinary course of actual commerce."

The exhibits introduced in evidence cannot be said to comply with this definition. (R. pp. 88 and 89). Also see United States v. One Hundred and Thirty-two Packages, 76 Fed. 364, 368; Vol. 2 Bouvier's Law Dictionary under Title, "Original Packages." (See R. pp. 48, 49 and 50.)

The statute is not unconstitutional as a regulation or burden on interstate commerce.

It is a well settled principle in interpretation of statutes that they are presumed to be constitutional unless repugnancy to the Constitution clearly appears.

> Buttfield vs. Stranahan, 192 U. S. 492
> Nicol vs. Ames, 173 U. S. 509, 514, 515
> Gettysburg Park Case, 160 U. S. 668, 680.

Safeguarding the public health and safety is valid exercise of police power of state.

The evident purpose of the statute requiring cosmetics to be registered is to prevent the sale of cosmetics which would be injurious to the health of the people of the State of Maine. Its requirements are directed to that and are reasonable.

> "But when the local police regulation has real relation to the suitable protection of the people of the State, and is reasonable in its requirements, it is not invalid because it may incidentally affect interstate commerce, provided it does not conflict with legislation enacted by Congress pursuant to its constitutional authority. . ."
>
> *Savage vs. Jones* 225 *U. S.* 501, 525.

In that case, statute related to sale of food for domestic animals and required filing of statements and certificates, affixing labels, etc., bearing certain information as to ingredients, etc. This statute was upheld as a valid exercise of the police power of the state.

In *Fourgera & Co. vs. New York*, 224 *N. Y.* 269, 120 *N. E.* 642, the complainant sought to enjoin enforcement of certain sections of the Sanitary Code adopted by the Board of Health of the City of New York. These sections provided that patent or proprietary medicines should not be sold in New York unless "the names of the ingredients of every such medicine to which the therapeutic effects claimed are attributed, and the names of all other ingredients, except such as are physiologically inactive, shall be registered in the department of health." The code also provided for the registration of other information. The Court in that case said:

> "The argument is made that the ordinance is an arbitrary exercise of the power of government. We do not think so. Its purpose and effect are well within the limits of the police power. The purpose is the preservation of the public health and safety - - - -
>
> " 'No man has a constitutional right to keep secret the composition of substances which he sells to the public as articles of food.' State v. Aslesen, supra. If that is true of food, it is even more plainly true of drugs. A danger exists, and the only question is whether the means of correction are appropriate. We cannot say that the means have no relation to the end. The public health is safeguarded by disclosure to public officers charged by law with its protection. We are not called upon to approve the wisdom of the ordinance. We stop when we satisfy ourselves that it has a reasonable relation to the end to be obtained."
>
> "Other objections are based upon a supposed conflict between the ordinance and the Federal Constitution. It is said that, if applied to transactions of interstate or foreign commerce, the act is an infringement of the exclusive

> power of Congress. We think this objection is answered by Savage v. Jones, 225 U. S. 501, 56 L. ed. 1182, 32 Sup. Ct. Rep. 715. The ordinance is an exercise of the police power of the state for the protection of the lives of its inhabitants . . . . . (cites cases) . . . . Such legislation may be permitted, though it affect incidentally interstate or foreign commerce, until Congress has disclosed a purpose to supersede the police power of the states, and take exclusive possession of the field . . . . . ."

In *Patapasco Guano Co. v. North Carolina;* 171 *U. S.* 345, 357. the Court upheld the statute, saying:

> "Whenever inspection laws act on the subject before it becomes an article of commerce they are confessedly valid, and also when, although operating on articles brought from one state into another, they provide for inspection in the exercise of that power of self protection commonly called the police power – – – where the subject is of wide importance to the community, the consequences of fraudulent practices generally injurious, and the suppression of such frauds matter of public concern, it is within the protective power of the state to intervene. Laws providing for the inspection and grading of flour, the inspection and regulation of weights and measures, the weighing of coal on public scales, and the like, are all competent exercises of that power, and it is not perceived why the prevention of deception in the adulteration of fertilizers does not fall within its scope – – – The Act of January 21, 1891, must be regarded, then, as an Act providing for the inspection of fertilizers and fertilizing materials in order to prevent the practice of imposition on the people of the state, and the charge of twenty-five cents per ton is intended merely to defray the costs of such inspection. It being competent for the state to pass laws of this character, does the requirement of inspection and payment of its cost bring the Act into collision with the commercial power vested in Congress? Clearly this cannot be so as to foreign commerce, for clause two of section ten of article one expressly recognizes the validity of

state inspection laws, and allows the collection of the amounts necessary for their execution, and we think the same principle must apply to interstate commerce. In my view, the effect on that that commerce is indirect and incidental and 'the Constitution of the United States does not secure to any one the privilege of defrauding the public.' "

See also—Plumley v. Massachusetts, 155 U. S. 461.

McLean v. Denver & Rio Grande R. R. Co. 203 U. S. 38, 50. Crescent Mfg. Company vs. Wilson 233 N. Y. 282.

The statute does not delegate legislative functions.

The statute (Section 2) provides that:

"The said department is hereby authorized to issue and shall issue a certificate of registration to the manufacturer, proprietor, or producer of any cosmetic preparation on the payment of an initial registration fee of 50c per preparation, which certificate shall be renewed annually on or before the first day of January in each succeeding year on the payment of a fee of 50c . . . . ."

It is clear from a consideration of the statute as a whole that it was intended to prevent the sale of cosmetics containing substances in such amounts as to be poisonous, injurious or detrimental to the citizens of the State of Maine. The appellant argues that because the Legislature did not provide rules, regulations, ordinances or by-laws of any kind it amounts to a delegation of legislative duties.

The authorities on the question of Delegation of Powers are collected in *Union Bridge Co.* v. *United States* 204 *U. S.* 364, 377 *et seq.* In that case, the Court upheld an Act of Congress providing that navigation be freed from unreasonable obstructions arising from bridges which are of insufficient height or

width of span, or are otherwise defective and imposing the duty upon an executive officer of ascertaining what particular cases come within the prescribed rule. This was held not to be a violation of the Constitutional prohibition against delegation of legislative or judicial power.

In *Buttfield v. Stranahan*, 192 *U. S.* 470, 496, the Court said:

"The claim that the statute commits to the arbitrary discretion of the Secretary of the Tresaury the determination of what teas may be imported, and therefore in effect vests that official with legislative power, is without merit. We are of the opinion that the statute, when properly construed as said by the Circuit Court of Appeals, but expressed the purpose to exclude the lowest grade of teas, whether demonstrably of inferior purity, or unfit for consumption, or presumably so because of their inferior quality. This, in effect, was the fixing of a primary standard; and devolved upon the Secretary of the Treasury the mere executive duty to effectuate the legislative policy declared in the state . . . . Congress legislated on the subject as far as was reasonably practicable, and from the necessities of the case compelled to leave to executive officials the duty of bringing about the result pointed out by the statute . . . "

St. Louis & Iron Mountain Ry. V. Taylor, 210 *U. S.* 281, 287.

"It is contended that there is here an unconstitutional delegation of legislative power to the Railway Association and to the Interstate Commerce Commission. This is clearly a Federal question. Briefly stated, the statute enacted that after a date named only cars with bars of uniform height should be used in interstate commerce, and that the standard should be fixed by the Association and declared by the Commission. Nothing need be said upon the question except that it was settled adversely to the contention of the plaintiff in error in Buttfield v. Stranahan, 192 U. S. 270, a case which in principle is completely in point. And see Union Bridge Co. v. U. S. 204 U. S. 364, where the cases were reviewed."

Red "C" Oil Co. vs. North Carolina, 222 *U. S.* 380, 394.

> "The legislative requirement was that the illuminating oils furnished in North Carolina should be safe, pure and afford a satisfactory light, and it was left to the Board of Agriculture to determine what oils would measure up to these standards. We think a sufficient primary standard was established, and that the claim that legislative powers were delegated is untenable . . . "

The Legislature in the case at bar has merely conferred on the Department of Health and Welfare authority or discretion as to the law's execution which is to be exercised in pursuance of the obvious intention of the act. There is no delegation of the legislative powers involved in this case.

The Legislature went as far as was reasonably practicable. To have gone farther would have required a knowledge which the Legislature could not be expected to possess. The knowledge of ingredients, the chemical analysis thereof, and the methods of detecting injurious substances, etc., require a special knowledge which is within the specialized field of the Department of Health and Welfare.

It is argued by the complainant that the Department of Health and Welfare could make unreasonable and arbitrary regulations, which would not be subject to review. The defendants respectfully contend that the act does not enable the Department of Health and Welfare to make unreasonable or arbitrary regulations. If appellant sought to register a harmless preparation and registration was refused, it has its remedy by an appeal to the Superior Court where a trial by jury can be had upon questions of fact. The act is directed against harmful, injurious and poisonous cosmetics and it cannot be fairly argued that the Department of Health and Welfare can arbitrarily decline to register harmless or non-poisonous cosmetics, or make regulations discriminating against one manufacturer or another doing an intra-state business in Maine.

The statute is not unconstitutional by reasons of the due process clause of the Federal Constitution.

The appellant contends that the statute is unconstitutional because it does not exempt harmless merchandise such as perfumes.

The statute in question was approved April 1, 1935, and by its own provisions was to become effective January 1, 1936, and Section 9 of the act provides as follows:

> "Any preparation or preparations purchased prior to the effective date of this act shall not be subject to the provisions of this act, provided that satisfactory evidence is presented that purchase was made prior to the effective date of this act, and further provided that such preparation or preparations are not prohibited by this act because they contain ingredients that are poisonous, injurious or irritating."

After the passage of the act, the plaintiff had over nine months in which to adjust its cosmetic preparations so that they could be registered by the local dealers in Maine, and not contain injurious or harmful ingredients before the act became effective. The provisions of the act were prospective and not retroactive.

On this state of facts the plaintiff is not deprived of its property without due process of law. The case at bar, on this point, does not come within the case of Fourgera & Co. v. New York, 224, N. Y. 269, 120 N. E. 642, cited by appellant. In that case the act was apparently passed to become effective immediately.

The statute in the case at bar does not forbid the sale of harmless merchandise; it merely provides for registration of cosmetics in order that the sale of harmful cosmetics may be prevented.

The statute is not unconstitutional in that the fees may be devoted to purposes other than inspection of cosmetics.

The appellant argues that the statute is unconstitutional even if it is an inspection statute because the fees are not limited to the actual costs of inspection of intra-state business. There is no evidence in this case to show that the fees received from registration of cosmetics have been used for purposes other than the inspection of cosmetics in intra-state commerce. There is no evidence to show that the charge is unreasonable or that it was more than it would cost to inspect and register the cosmetics. True, the appellant cites authority that an act was unconstitutional in another state because it did not segregate the expense of inspecting intra-state shipments from the expense of inspecting interstate shipments. There is evidence in the record that this inspection law will not be applied to interstate shipments. Doctor Campbell testified (R. p. 170) that the department would not make inspection of interstate shipments. (Interrogatories R. pp. 30 and 41.) In the absence of evidence showing that the fees are unreasonable and that they will be used for inspection of interstate shipments the statute should not be declared unconstitutional.

Valuable property rights are not destroyed by ex parte orders of Department of Health and Welfare.

The appellant contends that the statute is unconstitutional because it does not give the manufacturer the right of notice, open hearing, and the right to present testimony, to cross-examine and fair opportunity to comply with rulings.

The right of a local manufacturer or dealer to continue selling his preparation is a valuable property right which cannot be

destroyed by an ex parte order of an executive body whose determination cannot be reviewed. In the case at bar the ruling of the department can be reviewed by the Superior Court of the State of Maine.

The statute provides that:

> "From the refusal of said department to issue a certificate of registration for any cosmetic preparation appeal shall lie to the superior court in the county of Kennebec or any other county in the state for which the same was offered for registration."

And Section 10 of the act further provides as follows:

> "Any person, firm or corporation that violates any provision of the preceding sections, or any ordinance, or by-law, or regulation made thereunder, shall be punished by a fine of not more than $100. . . . . ."

This does not invoke the above proposition as declared by appellant. The statute provides for registration, and declares the penalty for non-compliance. The fines and penalties are not levied by the Department of Health and Welfare but are expressly specified in the Act.

> "From the beginning of the Government various acts have been passed conferring upon executive officers power to make rules and regulations—not for the government of their departments, but for administering the laws which did govern. None of these statutes could confer legislative power. But when Congress had legislated and indicated its will, it could give to those who were to act under such general provisions 'power to fill up the Details' by the establishment of administrative rules and regulations, the violation of which could be punished by fine or imprisonment fixed by Congress, or by penalties fixed by Congress, or measured by the injury done."
>
> "In Union Bridge Co. v. United States, 204 U. S. 364; In re Kallock, 165 U. S. 326; Buttfield v. Stranahan, 192 U. S. 470, it appeared from the statutes involved that

> Congress had either expressly or by necessary implication made it unlawful, if not criminal, to obstruct navigable streams; to sell unbranded oleomargarine; or to import unwholesome teas. With this unlawfulness as a predicate the executive officers were authorized to make rules and regulations appropriate to the several matters covered by the various acts. A violation of these rules was then made an offense punishable as prescribed by Congress. But in making these regulations the officers did not legislate. They did not go outside the circle of that which the act itself had affirmatively required to be done, or treated as unlawful if done. By confining themselves within the field covered by the statute they could adopt regulations of the nature they had thus been generally authorized to make, in order to administer the law and carry the statute into effect."

United States v. Grimond, 220 *U. S.* 506, 517, 518.

If appellant applies for registration and is refused, it has a remedy. If it is prosecuted for a violation of the act, the court will determine the facts and if found guilty, a penalty as established by the act up to $100.00 could be imposed. The Department of Health and Welfare is not authorized, nor does it attempt, to issue orders whereby anyone affected is not given a right to a hearing.

This is a different case than those cited by appellant where the executive body levied the fines and penalties or where the executive body attempted to enforce regulations not authorized by the statute.

Appellants' valuable property rights are not subject to destruction by ex parte orders of an executive body.

The penalty as fixed by the statute is not excessive and does not prevent appellant from testing constitutionality of act.

The statute in question provides a penalty or a fine of not more than $100.00. It applies to any person, firm or corporation that violates any provision of the act and is not confined to the proprietors of a beauty shop, barber shop, hairdressing establishment or similar establishment. It is an attempt on the part of the Legislature in the exercise of its police power to make laws for the protection of the public health.

The Legislature having enacted such laws in general terms, may confer on a board of health the duty of enforcing them, and to that end may give it authority to make reasonable rules and regulations which shall have the effect of law. (A. L. R. 54-1114.) The board may not in itself provide a penalty for the violation of its regulations, but it is competent for the Legislature to prescribe a penalty for the violation of rules or regulations thereafter made by the board.

In the case at bar the Legislature prescribed the penalty set forth in the act. This penalty is not too grossly excessive as to constitute a deprivation of property without due process of law, nor is the penalty of so extreme a character as probably to prevent resort to the courts to test statute's validity.

> "The contention that the statute intimidates against a contest of its legality by the severity of its penalties, and is therefore unconstitutional on that ground, within the ruling in Ex Parte Young, 209 U. S. 123, 52 L. ed. 714, is not justified."

Rast v. Van Devan & L. Co. 240 *U. S.* 342.

That case involved penalties of $1,000 fine or six months imprisonment for violations of a statute against the sale without payment of a specified license fee, of merchandise accompanied by coupons, etc.

> "As to the objection because of the penalties, this is not a suit to enforce penalties; nor in view of the provisions of the statute can we say that the penalties are as great as to prevent a resort to the courts to ascertain the constitutionality of the law. . . . ."

Rail Coal Co. v. Ohio Industrial Comm. 236 *U. S.* 338, 350.

In that case statute provided:

> "Any person, firm or corporation violating the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction, shall be fined for each separate offense not less than $300 nor more than $600."

The Legislature in the exercise of the police power may regulate, restrain and prohibit whatever is injurious to the public health and morals.

Admitting that the subject to which the statute relates is within the scope of legislative power, the test of validity within the police power is whether or not the regulations prescribed are reasonable; and the test of reasonableness is whether the attempted regulation makes efficient constitutional guaranties and conserves rights, or is destructive of inherent rights.

If the regulations prescribed are reasonable, they are valid, but if they are unreasonable, they are void, as the taking of private property without compensation and without due process of law. In applying this test it must be remembered the presumption is in favor of the reasonableness and validity of the law.

Powers v. Pennsylvania, 127 *U. S.* 678.

It is the duty of the courts to enforce the state's police regulations enacted by the Legislature in good faith and with reasonable and appropriate regard for the protection which the state owes the life, health and property of her citizens.

The Legislature is the sole judge as to all matter pertaining to the policy, wisdom, and expediency of statutes enacted under the police power.

State v. Legendre, 138 *La.* 154, 70 *S.* 70
Erie Railway Co. vs. Williams, 233 *U. S.* 685.

On the other hand, whether the legislation purporting to be enacted in the exercise of the police power is rightly such, and whether regulations prescribed by the Legislature are unreasonable or are otherwise unconstitutional, are questions for the judiciary.

McLean vs. Arkansas, 221 *U. S.* 539
California Reduction Co. v. Sanitary Reduction Works, 127 *Fed.* 29.

It was admitted by Doctor Blaisdell, appellant's expert witness (R. pp. 156 and 157) that there were injurious ingredients in some cosmetics, that all cosmetics are different so far as the ingredients are concerned; and the defendants argue that it was the intent of the Legislature in the enactment of the Cosmetic Law to prohibit the sale of cosmetic preparations which contained injurious or poisonous substances. In other words it is a protective measure for the people of Maine, and upon a reasonable construction of the act there is some substantial reason why such legislation will promote the public health.

The appellees respectfully contend that the statute should be sustained as a reasonable exercise of the police power of the state, and that the court should take the view that the enactment has for its object the preservation of the public health and the general welfare of the citizens of the State of Maine.

> "Language of the Constitution is generally extended to include new things and new conditions of same class as those specified which were not known or contemplated on adoption."

Glaser v. Buck, 179 *N. E.* 1 (*Ind.*).

"Burden is upon those alleging unconstitutionality of legislative act to show clearly and palpably wherein it violates Constitution."

Bowes v. Glas. 179 *N. E.* 80 (*Ill.*).

"Milk Control Act disclosing legislative policy and specifically directing milk control board to take measures requisite for elimination of destructive trade practices and ruinous competition and to consider, in fixation of prices, the grade quality of milk and other conditions affecting costs of production, transportation and marketing to permit reasonable return to the producers of milk dealers HELD not unconstitutional as delegating legislative powers to the board."

State Board of Milk Control v. Newark Milk Co. 179 *A.* 116 (N. J.).

"Courts are loath to overthrow acts of Legislature in exercise of its police power if Legislature acts reasonably."

Moritz v. United Brethrens Church 269 *N. Y.* 125-199 *N. E.* 29.

Suffolk County v. Water Power and Control Commission 199 *N. E.* 41, 269 *N. Y.* 158.

The Act is not repugnant to Section 10, Clause 2, of Art. I, of the Constitution of the United States of America.

The appellant argues on Page 32 of its brief that the state does not have the constitutional power to exact a registration fee as a condition precedent to the sale of merchandise within the state. The appellees submit that the levying of a local tax upon imports comes within the constitutional inhibition, but there must be some point of time when imports lose their

character as such and cease to possess rights superior to the general mass of property in the country. In the present case the registration fee is not applied by the state officials until the goods are in the hands of local dealers for sale in intrastate commerce, and the act in no way affects the plaintiff-appellant or violates Article I of the Constitution of the United States of America. Chief Justice Marshall in the leading case of Brown vs. Maryland, Supra., discussed with characteristic fullness, clearness and power, the principles underlying this question, and blazed a path from which the courts have not strayed for the past one hundred and ten years. When goods are imported into the United States from a foreign country for sale and use here, there must be some point of time at which they lose their character as an import. What that point is, depends upon the peculiar facts of each particular case, and the manner in which the importer deals with the imported goods.

In the case at bar the plaintiff-appellant has no control of the cosmetics after they are in the hands of the retail dealers in Maine, and there broken down and each article placed on sale in the local stores, nor does the Maine act apply to those cosmetic preparations until they are out of interstate commerce. It is true that the effect of the original package cases have been obviated to a certain extent by the Act of Congress known as the Wilson Act, and the Webb-Kenyon Act, but these acts apply to intoxicating liquors. The Wilson Act has been sustained by this court as a constitutional exercise by Congress of its power to regulate interstate commerce. The Webb-Kenyon Act goes a step further than the Wilson Act and makes the fact that intoxicating liquors are in original packages no bar to the action of a state in forbidding their importation into prohibition territory. The Wilson Act only modified existing rules by causing interstate commerce shipments of intoxicating liquors to come under state control at an earlier date than

they otherwise would, that is, after delivery but before sale in the original packages. The term original package has been defined in somewhat different language, but for the most part with a single inherent meaning. A comprehensive and satisfactory definition is this:

> "An original package, as applied to interstate and international commerce, is a package, bundle or aggregation of goods, put up in whatever form, covering or receptacle, for transportation, and as a unit transported from one state or nation to another. It is the identical package delivered by the consignor to the carrier at the initial point of shipment in which it was shipped." (12 C. J. Page 31.)

Findings of the Statutory Court under Section 380 of Title 28, of the United States Code.

After stating many of the facts the Honorable Court below disposed of the federal questions, as follows:

> "23. Since the manufacturer is not required to furnish samples of its preparations with a formula containing its ingredients, the Department of Health and Welfare perforce must go to places where cosmetic preparations are on sale in this State and purchase packages and analyze their contents to determine whether they contain any substance or substances in such amounts as to be injurious to the health of the person using such preparations. Evidence introduced before the Court disclosed that certain cosmetic preparations have proven injurious to the users of the same.
>
> 24. No evidence has been submitted on behalf of plaintiff clearly showing that the fees fixed by said Chapter 109 are excessive." (R. p. 58.)

Conclusions of Law by the Court.

> "2. The original packages in which plaintiff has shipped its cosmetic preparations to the State of Maine, have been and are the shipping containers in which the cosmetic

preparations have been shipped into the State, and when the cosmetic preparations, put up in individual bottles or packages, are removed from said shipping containers and placed on its shelves or counters or in the storerooms of the retailer to be sold directly to the ultimate consumer, said cosmetic preparations were and are no longer in interstate commerce, and if unregistered in accordance with Section 2 of said Chapter 109, said cosmetic preparations were and are subject to seizure and forfeiture, as provided in said Chapter 109.

5. Said Chapter 109 is not in violation of the Constitution of the State of Maine or of the United States." (R. pp. 58 and 59.)

Articles 9 and 10 of the amendments to the Constitution of the United States provide that the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people, and the powers not delegated to the United States by the Constitution, nor prohibited by it to the States are reserved to the States respectively, or to the people, and the appellees submit that the State of Maine under its police power, and the provisions of the Constitution of the United States and the State of Maine, has the right to enact Legislation to protect the health and promote the general welfare of the people of the State of Maine.

The burden of proof was on the plaintiff-appellant to sustain the allegations set forth in its two Bills in Equity in the United States District Court of Maine, and the appellees submit that the plaintiff-appellant failed to produce sufficient evidence to entitle it to an injunction, and for this reason the appellees pray that the judgment and decree of the statutory court below be sustained.

Respectfully submitted,

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Counsel for Appellees.

SUPREME COURT OF THE UNITED STATES.

No. 534.—October Term, 1936.

Bourjois, Inc. *vs.* Clyde R. Chapman, et al.	Appeal from the District Court of the United States for the District of Maine.

[April 26, 1937.]

Mr. Justice Brandeis delivered the opinion of the Court.

Bourjois, Inc., a New York corporation, brought, in the federal court for Maine, this suit seeking to enjoin, both temporarily and permanently, the enforcement of Chapter 109 of the Public Laws of Maine, 1935, entitled "An Act for the Regulation of Cosmetics". The bill was filed before January 1, 1936, the effective date of the Act. The Attorney General of Maine, the Commissioner of Health and Welfare and the Director of Public Health were made defendants. The answers denied the material allegations of the bill. The case was heard before three judges; the application for a temporary injunction was denied, on the ground that plaintiff's objections were prematurely raised; and leave was granted to renew its motion if in enforcing the Act interstate commerce should be interfered with or due process denied. Thereafter, a supplemental bill and answer were filed; the case was again heard; the court concluded that there was both federal and equitable jurisdiction; denied a motion for a temporary injunction; and entered a final decree dismissing the bill. — Fed. Supp. —. The case is here on appeal.

Section 1 of the Act provides:

"Registration of cosmetics. On and after January 1, 1936 no person, firm, corporation or copartnership shall hold for sale, sell, offer for sale, in intrastate commerce, give away, deal in, within this state, supply or apply in the conduct of a beauty shop, barber shop, hairdressing establishment or similar establishment, any cosmetic preparation unless the said preparation has been registered with and a certificate of registration secured from the department of health and welfare."

Section 2 declares that the purpose of the Act is to safeguard the public health; and provides for the issue of certificates of registration by the department of health and welfare "to the manufacturer, proprietor, or producer of any cosmetic preparation." Other sections of the Act contain elaborate provisions for the seizure and forfeiture of "cosmetic preparations kept or deposited within the state intended for unlawful sale or use"; and for imposition of fines upon violators of the statute.

The plaintiff manufactures cosmetics in New York; has no place of business in Maine; and does not hold, use, apply, or sell cosmetics within that State. Among its many customers are some whose places of business are in Maine; and their purchases are made in part on orders given in Maine to travelling salesmen of the plaintiff. But no order so given is binding until approved by the plaintiff in New York. All shipments to Maine customers are made from New York; and the sales of the cosmetics in Maine are not made in the original packages, the large containers in which the cosmetics are shipped from New York. Compare *Purity Extract and Tonic Co.* v. *Lynch*, 226 U. S. 192, 201; *Hebe Co.* v. *Shaw*, 248 U. S. 297, 304.

The plaintiff has not applied for a certificate of registration of any of its preparations; and it announces that it will refuse to do so, because the statute is void under the Federal and State Constitutions. Sixteen distinct grounds of invalidity are urged with great earnestness. None is well founded. Only a few need to be discussed.

First. Most prominent is the claim that the legislation violates the commerce clause. By its terms, the statute is limited in operation to intrastate commerce. It does not attempt to prohibit or regulate the introduction of cosmetics into the State. It is not directed to manufacturers. It applies only to persons who deal in cosmetics, or apply them, within the State; and the plaintiff does not do so. No doubt the plaintiff will lose its Maine customers unless its preparations may be sold there; and their sale will be prohibited within the State unless the preparations are registered. But the State does not demand that the application for registration be made by the manufacturer or proprietor of the preparation. The defendants who administer the statute have construed it as permitting any one interested to make the application. As some cosmetics may be of a character to injure the health of the users, the State may prohibit the sale in intrastate commerce of a preparation unless it has

been found, upon due enquiry, to be harmless. The fact that plaintiff's products are made in New York does not confer immunity from such regulation in Maine. Compare *Mutual Film Corporation* v. *Hodges*, 236 U. S. 248, 258; *Armour & Co.* v. *North Dakota*, 240 U. S. 510, 517; *Pacific States Box & Basket Co.* v. *White*, 296 U. S. 176, 184. There is no discrimination against interstate commerce, since the regulation applies equally to all preparations, whether manufactured within or without the State of Maine.

Second. The plaintiff contends that its interstate commerce is directly burdened, because registration, which is indispensable to the maintenance of its trade in Maine, involves payment of a fee; that only an inspection fee can be justified; and that the State has failed to show that the fee charged is not in excess of the cost of inspection. Section 2 of the statute fixes the initial fee at 50 cents per preparation, with a similar annual renewal fee; and stipulates that:

"Fees received under the provisions of this act shall be used by said department for carrying out the purposes of this act."

Even if it had been necessary, under the rules applied in *Foote & Co., Inc.* v. *Stanley*, 232 U. S. 494, and *Great Northern Ry. Co.* v. *State of Washington*, 300 U. S. —, for the State to establish that the fees here charged are not excessive, the State must be deemed to have sustained that burden. The fact that the fee for registration is only 50 cents suggests that it may prove inadequate rather than excessive. The case was heard shortly after the statute became operative. It was obviously impossible then to determine whether the fees would prove to be in excess of the administrative requirement, and in this situation it is sufficient if it is shown that the charges are not unreasonable on their face. As was said in *Patapsco Guano Co.* v. *North Carolina Board of Agriculture*, 171 U. S. 345, 354, "If the receipts are found to average largely more than enough to pay the expenses, the presumption would be that the legislature would moderate the charge." See *Red "C" Oil Manufacturing Co.* v. *Board of Agriculture of North Carolina*, 222 U. S. 380, 393. Here, the statute operates directly only upon intrastate commerce. Where interstate commerce is only indirectly affected, it rests upon one challenging the legislation to show actual undue burden upon such commerce. See *Pacific Telephone & Telegraph Co.* v. *Tax Commission of Washington*, 297 U. S. 403. The mere fact that the fees imposed might exceed the

cost of inspection is immaterial. See *General Oil Co.* v. *Crain*, 209 U. S. 211, 231; *Texas Co.* v. *Brown*, 258 U. S. 466, 475, 476.

The Maine statute presents no question under the equal protection clause of the Fourteenth Amendment such as was dealt with in *Great Northern Ry. Co.* v. *State of Washington*, 300 U. S. —. The statute provides that the fees collected shall be devoted solely to the enforcement of this Act; and the Act directly regulates but one class of activity. The record shows that the State Treasurer has set up a separate account to which all cosmetic fees are credited, and against which are to be charged only the expense of enforcement. Compare *Gundling* v. *Chicago*, 177 U. S. 183, 189; *Mountain Timber Co.* v. *Washington*, 243 U. S. 219, 237; *Texas Co.* v. *Brown*, 258 U. S. 466, 479.

Third. The plaintiff contends that in other respects the statute violates rights protected by the Fourteenth Amendment and the Constitution of the State. It objects that the power conferred upon the board to grant or deny a certificate is unlimited; that the board has issued no regulations; and that neither the statute nor the board has provided for hearing an applicant. The plaintiff has not applied for a certificate; and it is not to be assumed that, if he concludes to do so, his application will be refused, or that the board will deny any right to which he is entitled. See *Gundling* v. *Chicago*, 177 U. S. 183, 186; *Lehon* v. *City of Atlanta*, 242 U. S. 53, 56; *Smith* v. *Cahoon*, 283 U. S. 553, 562; *Highland Farms Dairy, Inc.* v. *Agnew*, decided March 29, 1937.[1] There are also other answers to this contention. Section 2 defines the department's control of registration:

"The said department is authorized to regulate or to refuse the issuance of certificates of registration or to prohibit the sale of cosmetic preparations which in its judgment contain injurious substances in such amounts as to be poisonous, injurious or detrimental to the person."

Delegation of the power to exercise that judgment is not obnoxious to the Constitution of Maine. Compare *Bangor Railway & Electric Co.* v. *Orono*, 109 Me. 292, 296, 84 At. 385; *In re Knox County Electric Co.*, 119 Me. 179, 182, 109 At. 898; *McKenney* v. *Farnsworth*, 121 Me. 450, 452-454, 118 At. 237. And obviously, it contravenes no provision of the Federal Constitution. Compare *United*

[1] Compare Dalton Adding Machine Co. v. State Corporation Commission, 236 U. S. 699; Lehmann v. State Board of Public Accountancy, 263 U. S. 394, 398; Continental Baking Co. v. Woodring, 286 U. S. 352, 368, 369.

States v. *Grimaud*, 220 U. S. 506, 517; *Mutual Film Corporation* v. *Industrial Commission of Ohio*, 236 U. S. 230, 246; *Hall* v. *Geiger-Jones Co.*, 242 U. S. 539, 554; *Highland Farms Dairy, Inc.* v. *Agnew*, decided March 29, 1937. Neither constitution requires that exercise of such a power be preceded by the adoption of regulations. And neither constitution requires that there must be a hearing of the applicant before the board may exercise a judgment under the circumstances and of the character here involved. The requirement of due process of law is amply safeguarded by Section 2 of the statute, which provides:

"From the refusal of said department to issue a certificate of registration for any cosmetic preparation appeal shall lie to the superior court in the county of Kennebec or any other county in the state from which the same was offered for registration."

Compare *Hagar* v. *Reclamation District No. 108*, 111 U. S. 701, 711, 712; *Hall* v. *Geiger-Jones Co.*, 242 U. S. 539, 554; *Bragg* v. *Weaver*, 251 U. S. 57, 59; *Phillips* v. *Commissioner*, 283 U. S. 589, 597; *State* v. *McCann*, 59 Me. 383, 385; *Bennett* v. *Davis*, 90 Me. 102, 106, 37 At. 864; *McInnes* v. *McKay*, 127 Me. 110, 116, 141 At. 699, 279 U. S. 820.

Fourth. Plaintiff urges that relief should be granted because the provisions of the statute concerning seizure and forfeiture of unregistered cosmetics violate the Constitution of Maine. To that claim it is a sufficient answer that if there is a wrongful seizure, it will be of goods belonging to others. For, as the bill and findings reveal, no goods of the plaintiff will ever be liable to seizure, since the plaintiff will have none in Maine. If under this statute the constitutional rights of others are violated by an unlawful seizure and forfeiture, they, and not the plaintiff, must seek the redress. Compare *Tyler* v. *Judges*, 179 U. S. 405, 409, 410; *Standard Stock Food Co.* v. *Wright*, 225 U. S. 540, 550; *Dier* v. *Banton*, 262 U. S. 147, 149-150. Hence, we intimate no opinion on the merits of the point raised by plaintiff.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.